IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 366

ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

ELIZABETH B. BOWMAN, as Conservator of the Person and Estate of Charles Dale Bowman,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

FLOYD E. THOMPSON
CHARLES J. O'LAUGHLIN
THOMAS P. SULLIVAN
11 South LaSalle Street
Chicago 3, Illinois

JOSEPH H. WRIGHT
HERBERT J. DEANY
ROBERT S. KIRBY
135 East 11th Place
Chicago 5, Illinois

Attorneys for Petitioner.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioner, the Illinois Central Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court entered in this cause.

Opinions Below.

The opinions of the majority and dissenting Judges of the Illinois Supreme Court (R. 25-57) appear as Appendix B to this Petition, separately printed, and are reported at 11 Ill. 2d 186, 142 N.E. 2d 104.

The opinion of the Illinois Appellate Court (R. 2, Appendix to Petition for Leave to Appeal) appears as Appendix C to this Petition, and is reported at 9 Ill. App. 2d 182, 132 N.E. 2d 558.

The memorandum opinion of the trial judge in passing on petitioner's post-trial motions, (R. 3, Abstract of Circuit Court Record, pp. 457-460,) not published, appears as Appendix D to this Petition.

Jurisdictional Statement.

The judgment of the Illinois Supreme Court, here sought to be reviewed, was entered March 20, 1957. (R. 58-59; Appendix A.) A petition for rehearing was denied May 20, 1957, (R. 62,) and the judgment became final on that date.

The jurisdiction of this Court is invoked under Section 1257(3), Title 28, United States Code, providing for review by this Court by certiorari of decisions of State courts wherein a right or privilege is specially claimed under the Constitution or statutes of the United States, or where the validity of a statute of the United States is drawn in question.

Questions Presented.

In reviewing cases tried to a jury, Illinois Appellate courts have the common law and statutory power and duty to review the evidence introduced by both parties, and if the court finds that the verdict of the jury is contrary to the manifest weight of the evidence, to reverse the judgment and remand the case for a new trial. In Illinois, as in most other States, this power has become an integral part of the appellate remedial process. Illinois Appellate courts also have the common law and statutory power and duty to review the amount of a jury verdict in tort cases, and if the court finds that the amount awarded is grossly

excessive to reverse the judgment and remand the case for a new trial or to affirm the judgment upon condition of remittitur. The Illinois Supreme Court in the case at bar held that when Illinois Appellate courts are reviewing cases brought under the Federal Employers' Liability Act, the Act nullifies both these powers. This holding presents the following questions:

(1) When a State appellate court is reviewing a case instituted under the Federal Employers' Liability Act may it exercise its common law (and in some states statutory) power to review the evidence for both parties and to remand the cause for a new trial of the issues, if it finds that the verdict of the jury is contrary to the overwhelming or manifest weight of the evidence or is otherwise clearly unjust; or is this power nullified by the Act?

(2) When a State appellate court is reviewing a case instituted under the Federal Employers' Liability Act may it exercise its common law (and in some States statutory) power to review the amount of the jury verdict and to remand the cause for a new trial or affirm the judgment upon condition of remittitur, if it finds that the amount awarded is grossly excessive; or is this power nullified by the Act?

(3) If the Federal Employers' Liability Act purports to nullify aspects of the appellate jurisdiction of State reviewing courts, is the Act to that extent void because it encroaches upon the Constitutional right of the States, reserved by the Tenth Amendment, to prescribe and regulate the powers and jurisdiction of their courts?

Constitutional Provisions and Statutes Involved.

The constitutional provisions and statutes involved are lengthy, and are therefore set forth separately as Appendix E to this Petition.

Statement of the Case.

The accident and settlement. Respondent's ward, Charles Dale Bowman, was injured May 22, 1948, in Richland County, Illinois, while in the course of his employment for petitioner as a locomotive fireman. Bowman, with his attorney, settled his claim with petitioner on September 18, 1948, for $15,000, and a settlement release was given. R. 3, Abst. pp. 291-293.

The proceedings in the trial court. On November 6, 1950, respondent, on behalf of Bowman, brought an action against petitioner for damages under the Federal Employers' Liability Act in the Circuit Court of Cook County, Illinois. (R. 3, Abst. pp. 2-6.) An issue at the trial was Bowman's mental competency at the time he entered into the contract of settlement. (R. 3, Abst. pp. 9, 11.) On June 2, 1954, the jury returned a special verdict finding that he was incapable of understanding the effect of the release, and a general verdict fixing damages at $200,000. (R. 3, Abst. p. 21.) Petitioner's post-trial motions were denied. R. 3, Abst. p. 38; Appendix D.

The proceedings in the Illinois Appellate Court. Petitioner perfected an appeal to the Appellate Court of Illinois, First District, contending (1) that the special verdict was contrary to the manifest weight of the evidence and therefore the judgment should be reversed and the cause remanded for a new trial, (2) that numerous prejudicial errors had occurred at the trial in the receipt and rejection of evidence, in the conduct of respondent's counsel and in

instructions to the jury, each of which required reversal and a new trial, and (3) that the general verdict was grossly excessive, requiring a new trial or substantial remittitur.

On March 5, 1956, the Appellate Court filed its opinion (Appendix C) and rendered its judgment reversing the judgment of the trial court and remanding the cause for a new trial. The Court held the case must be retried because (1) the special verdict (that Bowman was incompetent when his claim was settled and released) was contrary to the manifest weight of the evidence, and (2) numerous prejudicial errors respecting the receipt and rejection of evidence had been committed at the trial.

The Court rejected respondent's argument, based largely on the memorandum decision in *Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940, that the FELA nullified its power to require a new trial if the jury verdict was patently unjust, saying (App. 58A):

> "We cannot accept the reversal of the *Harsh* case, without explanation, as a decision against the right of an appellate state court to review the evidence in accordance with the uniform state practice . . ."

In view of its holding that the case must be tried again, and that all errors could be avoided on the new trial, the Appellate Court did not rule on petitioner's contention that the general verdict was grossly excessive or respondent's argument that the court was without authority to review the amount of damages awarded.

The proceedings in the Illinois Supreme Court. Respondent petitioned the Illinois Supreme Court for leave to appeal from the interlocutory and non-appealable judgment of the Appellate Court. (R. 1-2.) Pursuant to an order of the Illinois Supreme Court, the Appellate Court struck the portion of its judgment remanding the case for

a new trial (thus making its judgment final and appealable; see Section 75(2)(c) of the Illinois Civil Practice Act, Appendix E, p. 85A), and leave to appeal was granted to respondent by the Illinois Supreme Court. R. 14.

Respondent, in her petition for leave to appeal to the Illinois Supreme Court (R. 2, Pet. pp. 33-37) and in her brief after the granting of the petition (R. 18, Br. pp. 7-22) contended that a State appellate court is foreclosed by the FELA from reviewing the evidence and reversing and remanding for a new trial where it finds the verdict is contrary to the manifest weight of the evidence. Petitioner in its answer to the petition for leave to appeal (R. 16, Answ. pp. 7-12) and in its brief in support of the judgment of the Appellate Court (R. 20, Br. pp. 30-35) maintained that State appellate courts may exercise this jurisdiction in cases brought under the FELA, as in all other cases. This question of the interpretation of the FELA was squarely presented to and was decided by both courts, as appears from the opinions of the Appellate Court (App. 57A) and of the Supreme Court (App. 15A).

On March 20, 1957, the Illinois Supreme Court filed its opinion (R. 25-57; Appendix B) and by vote of four to three reversed the judgment of the Appellate Court and affirmed the judgment of the Circuit Court. R. 58-59, Appendix A.

The majority conceded that if the Appellate Court could exercise the jurisdiction vested in it by the Civil Practice Act and order a new trial when it found the verdict was contrary to the weight of the evidence, the Illinois Supreme Court could not review the correctness of the Appellate Court's determination of this question (R. 31; App. 10A):

> . . . judgments finalized under section 75(2)(c) [of the Illinois Civil Practice Act] can be reviewed by

this court only upon the same basis as other petitions for leave to appeal. Under section 92(3)(b) of the Civil Practice Act, the Supreme Court can examine cases brought to it by appeal from the Appellate Court as to questions of law only. Thus, even if a judgment of the Appellate Court is finalized under section 75(2)(c), this court could not review it if it merely raises the sufficiency of the evidence. *Olson* v. *Chicago Transit Authority*, 1 Ill. 2d 83.

"Judgments reversed and remanded for insufficient evidence ordinarily raise only factual questions relating to the weight of evidence. . . ."

The Court ruled, however, that in reviewing actions brought under the FELA the jurisdiction of the Appellate courts of Illinois to determine whether the jury verdict is contrary to the manifest weight of the evidence, was ousted by that Act. Relying primarily upon *Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940, (R. 36; App. 17A) and *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, (R. 35; App. 15A-16A) the Court said (R. 48; App. 32A):

". . . the scope of review of a jury verdict in a Federal Employers' Liability Act case is governed by Federal law and is limited to determining whether there is an evidentiary basis for the jury verdict . . ."

In other words, the Court below held that the FELA nullifies all powers of State appellate courts to review facts except to determine whether plaintiff has made a *prima facie* case.

Addressing the merits of the case, the Supreme Court held that respondent had introduced enough evidence of Bowman's mental incompetency at the time he signed the settlement contract to withstand a motion for directed verdict. It then went on to hold that no prejudicial evidentiary errors were committed at the trial.

Petitioner by its petition for rehearing in the Illinois Supreme Court (R. 61, Pet. pp. 6-15) pointed out that the construction that the court placed upon the FELA is in conflict with decisions of this Court and of the highest courts of other states, and contended that the decision denied to petitioner here the equal protection of the law guaranteed by the Constitution of the United States and by the Illinois Constitution. The Court by its additional opinion upon denial of the petition for rehearing (App. 37A) reiterated its position and held (App. 43A) that "in the light of the decisions of the United States Supreme Court, which we are obliged to follow in construing such federal rights, the Illinois Appellate Court herein was limited to determining whether there was an evidentiary basis for the verdict."

In the Court's opinion no mention was made of petitioner's contention that the verdict was grossly excessive. In its petition for rehearing, petitioner stated that if the Supreme Court adhered to its original conclusions, it should remand the case to the Appellate Court to consider that question. (R. 61, Pet. pp. 18-19). The majority's supplemental opinion (R. 52-57; Appendix 37A-45A) did not refer to petitioner's contentions concerning the amount of the verdict or remandment to the Appellate Court.

The three dissenting judges (Justices Schaefer, Hershey and Davis) wrote (R. 49-52; Appendix 33A-37A) that the majority's "over-cautious" ruling, "that the Federal Employers' Liability Act has abrogated the traditional jurisdiction of our reviewing courts", resulted from misconceptions of "nebulous dicta contained in certain decisions of the United States Supreme Court," and that it is "neither the prerogative, nor the intent, of Congress to

regulate the jurisdiction of State courts". They concluded (R. 51; Appendix 35A-36A):

> "The present decision of our court reads into the memorandum of reversal in *Harsh v. Illinois Terminal Railroad Co.* 348 U.S. 940, 99 L.Ed. 736, a mandate to abolish a substantial part of our local jury procedure and to abandon the statutory duties created by our legislature. . . . Such a serious impingement upon the rights and powers of State courts should require a positive expression. When dealing with our traditional and historical legal procedures, we should be slow to find some unspoken compulsion of Federal law requiring their abolishment. Cf. *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 95 L.Ed. 3."

REASONS FOR GRANTING THE WRIT.

Foreword.

In Illinois, an appellant is entitled in the Appellate Court to a review of all issues. However, in actions at law, on appeal from the Appellate to the Supreme Court, review is by statute limited to questions of law; issues of fact are finally determined by the Appellate courts. (Ill. Stat. 1955, Ch. 110, §92(3)(b).) Whether a jury verdict is contrary to the manifest weight of the evidence is deemed to be a question of fact which is settled finally by the Appellate Court. Accordingly, before the Illinois Supreme Court addressed the merits of this case, it was faced with a jurisdictional question: Did the Appellate Court have the authority to order a new trial because the verdict was contrary to the manifest weight of the evidence? If that power existed, the Illinois Supreme Court was foreclosed from disturbing the Appellate Court's determination that a new trial was necessary. *Shaw* v. *Courtney*, 385 Ill. 559, 562-565; *Mabee* v. *Sutliff & Case Co.*, 404 Ill. 27, 31-33.

In resolving this first question the Supreme Court of Illinois decided an important federal question. It held that in FELA cases the Act nullifies the Appellate Court's jurisdiction to determine that the case should be retried on the ground that the jury verdict is contrary to the manifest weight of the evidence. Only because it reached this conclusion was the court below free to address the case on the merits. The Supreme Court of Illinois also held, by implication, that the Appellate Court was without jurisdiction to review the amount of the verdict and remand for a new trial or affirm on condition of remittitur, even though the amount of the verdict was excessive.

This Petition is directed to these holdings as to the jurisdiction of State appellate Courts in reviewing jury verdicts in FELA cases. Assignments of trial errors are not here involved, nor is the question of law whether the evidence was sufficient to take the case to the jury, nor the questions of fact whether the verdict was contrary to the manifest weight of the evidence or was excessive.

I.

In holding that the Federal Employers' Liability Act nullifies an integral part of the Illinois appellate remedial process, the Illinois Supreme Court has misconceived the intent of Congress and decisions of this Court. It thereby decided an important federal question, not heretofore determined by this Court, in a way which conflicts with basic principles established by this Court.

The Illinois Supreme Court held that in determining appeals in FELA cases, State appellate courts may not review the evidence introduced by both parties and remand for a new trial upon finding the verdict of the jury to be contrary to the manifest weight of the evidence. The court held that this power, which is a common law power of all State reviewing courts, and which has been codified in Illinois statutory law for over a century (Ill. Stat. 1845 Ch. 83, §22; Ill. Stat. 1955 Ch. 110, §92(3)(b)) is nullified when the court is reviewing cases brought under the FELA.

A. *The federal Congress, in enacting the FELA, or in amending it, did not intend to nullify or alter the jurisdiction or powers of State appellate courts.*

All relevant expressions of Congressional purpose indicate an intention to permit State courts to adjudicate FELA cases within their customary jurisdictional frame-

work. The only provision in the FELA concerning actions in State courts appears in the second sentence of Section 6, which was added in 1910 (45 U.S.C. §56):

> "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

The authors of this provision made it abundantly clear that this sentence was intended only to confirm that State courts could adjudicate FELA actions if they chose to do so, and that there was no thought to nullify or alter the jurisdiction of State courts which accepted these cases. H. R. Rep., No. 313, 61st Cong., 2d Sess., p. 7; 45 Cong. Rec., 2253-4, 3395, 4034; Senate Rep. No. 432, 61st Cong., 2d Sess., p. 5.

The dissenting Judges in the court below protested against the majority holding (R. 51; Appendix 36A):

> " . . . Such a serious impingement upon the rights and powers of State courts should require a positive expression. When dealing with our traditional and historical legal procedures, we should be slow to find some unspoken compulsion of Federal law requiring their abolishment. *Cf. Missouri ex rel. Southern Railway Co.* v. *Mayfield*, 340 U.S. 1, 95 L. ed. 3."

B. *The decision of the Illinois Supreme Court is based upon misconceptions of a number of decisions of this Court. It is in direct conflict with controlling principles announced by this Court.*

It is clear from the foregoing that no Congressional expression dictated the result reached by the court below. Decisions of this Court, properly understood, likewise do not support it. It has long been settled that the Federal Employers' Liability Act does not nullify or alter the jurisdictional limitations of State courts, or local policies as to their use. *St. L., I. M. & S. Ry. Co.* v. *Taylor*, 210

U.S. 281, 285; *Second Employers' Liability Cases*, 223 U.S. 1, 56-59; *Douglas v. N. Y., N. H. & H. R. Co.*, 279 U.S. 377, 387-388; *Herb v. Pitcairn*, 324 U.S. 117, 120, 123; *Missouri v. Mayfield*, 340 U.S. 1, 4-5.

The holding of the Supreme Court of Illinois is in direct conflict with this settled principle, reiterated in *Herb v. Pitcairn*, 324 U.S. 117, 120:

> " . . . there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure."

There can be no doubt that this power of Illinois Appellate courts, to reverse jury verdicts and remand for a new trial of the issues where the evidence on both sides convinces the court that the verdict is manifestly unjust, is an integral part of the appellate remedial process in Illinois. This power has been utilized from the earliest days. It has become a basic portion of the jurisdiction of Illinois Appellate courts. The important role of this supervisory power in the Illinois judicial process was explained in *Voigt v. Anglo-American Provision Co.*; 202 Ill. 462, 465-466:

> " . . . It is, of course, the bounden duty of the Appellate Courts to consider questions of fact properly presented and to correct errors of fact committed by the trial courts. To an assignment of error that the verdict and judgment are against the weight of the evidence it is obviously no answer to say that there was evidence tending to support the finding below . . . Where, however, it is alleged that the trial court erred in overruling the motion for a new trial, based

> on the ground that the verdict was against the weight of the evidence, the Appellate Court is the only tribunal that can correct the error, if any has been committed, and the aggrieved party has the undoubted right to have the decision of that court on the question. Its decision being final on such a question, the duty fully to consider and determine it would seem to be all the more imperative."

In 1940, the Illinois Supreme Court reviewed at length the genesis and development of this power, and found its roots in common law practice, codified into Illinois statutory law. The court said that although the power must be exercised under "strict limitations", since "the courts will seldom interfere with the finding of a jury in actions *ex delicto*", it served as a salutary bar against patently unjust or capricious action by juries. *Corcoran* v. *City of Chicago*, 373 Ill. 567, 575-580; appeal dism. 311 U.S. 610.

In light of the history and fundamental nature of this aspect of the jurisdiction of the Appellate courts in Illinois, the holding of the Illinois Supreme Court cannot be squared with the principles expressed in *Herb* v. *Pitcairn* and many other decisions of this Court.

The majority of the Illinois Supreme Court misapplied the principle underlying the cases on which they relied, for example, *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, and *Brown* v. *Western Ry. of Alabama*, 338 U.S. 294. Those cases, like *Arnold* v. *P.&S.F.Ry. Co.*, 353 U.S. 360, recently decided, teach that State courts may not, by application of local rules, *forever* conclude an injured employee's right of action under the FELA or right to a jury trial of fact issues. But these decisions are inapplicable to the case at bar, because exercise of the power to require new trials when the verdict is unjust *does not foreclose* the employee's right to recover or to a jury trial; the rights of both

parties to a jury trial of fact issues is fully protected and either may adduce new evidence on the retrial. And there is no right, constitutional or statutory, to keep a verdict which was obtained by improper means or which is clearly unjust. *Sinopoli* v. *Chicago Rys. Co.*, 316 Ill. 609, 619-620. See also *Galloway* v. *U. S.*, 319 U.S. 372, 390-394.

Since the court below has decided this case in a way that is contrary to the principles underlying applicable decisions of this Court, and has misapplied other decisions of this Court which it erroneously deemed controlling, this Court should exercise its discretion to review and reverse this departure from the law.

C. *The Supreme Court of Illinois has decided an important question not previously decided by this Court, erroneously believing that the issue was resolved in Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940.

The court below put its ultimate reliance on the *per curiam* decision of this Court in *Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940, concluding that the issue presented in the case at bar was decided in the *Harsh* case. R. 36-37, App. 17A; R. 54-56, App. 40A-42A.

This Court's disposition of the *Harsh* case has produced much confusion. There, an Illinois Appellate Court had remanded a Safety Appliance Act case for a new trial on the ground that the verdict was against the manifest weight of the evidence (351 Ill. App. 272), the remanding order was stricken on plaintiff's motion making the reversal final, the Illinois Supreme Court denied leave to appeal leaving intact a final judgment for the defendant, and writ of certiorari was granted by this Court. The briefs filed in this Court raised as alternate issues whether the Appellate Court could review the evidence in a FELA case, and whether the Appellate Court's ultimate decision

that the defendant have judgment was correct. Oral arguments were heard. The decision of this Court reads simply: "Judgment reversed. *Lavender* v. *Kurn*, 327 U.S. 645."

It thus appears that an issue presented here was presented in the *Harsh* case. The perplexing question is whether this Court ruled on the issue. Six of the ten judges who have wrestled with the meaning of the *Harsh* reversal in considering the case at bar, believe this Court merely disagreed with the Appellate Court's conclusion on the weight of the evidence (R. 2, pp. xiv-xv; Appendix 57A-58A; R. 51; Appendix 35A-36A), while four believe this Court held the Appellate Court's power to reverse and remand for new trial was done away with by the FELA. R. 54-56; Appendix 40A-42A.

The citation of *Lavender* v. *Kurn*, we submit, reflects that this Court reviewed the record in the *Harsh* case and disagreed with the lower court's ultimate determination that the verdict was not supported by the evidence and that the defendant should have judgment, after the fashion of the many FELA cases, such as *Lavender* (see Note, 69 Harv. L. R. 1441), in which this Court has reviewed the *correctness* of lower courts' rulings that a verdict should be directed against the plaintiff or judgment entered against him notwithstanding the verdict. Never has this Court questioned the *authority* of State reviewing courts to make a determination of the sufficiency of the plaintiff's case. On the contrary, *Moore* v. *C. & O. R. Co.*, 340 U.S. 573, and *Brady, Admx.* v. *So. R. Co.*, 320 U.S. 476, upheld lower court rulings that the plaintiff's case was not submissible.

Moreover, it is most unlikely that the radical and far-reaching innovation, which the majority of the Illinois Supreme Court read into *Harsh* v. *Ill. Term. R. Co.*, would be embodied by this Court in a reversal without opinion.

Not long ago this Court found it necessary to intervene to prevent another State supreme court from surrendering local power under the misconception that the FELA, as construed by this Court, required it. *Missouri v. Mayfield*, 340 U.S. 1. See also *C. & O. Ry. Co. v. DeAtley*, 241 U.S. 310. This Court is now called upon to correct a similar baseless abdication of State authority.

We believe that the question raised in this case has never been decided by this Court, but in any event the issue is so important to the administration of justice in State courts (hereinafter, Part II) that it ought to be unequivocally resolved by this Court by full opinion.

II.

The courts of review of almost every State in the Union have asserted and upheld their jurisdiction to review the trial judge's determination of whether a new trial should be granted because the verdict is contrary to the manifest weight of the evidence. The holding of the Illinois Supreme Court that this power is nullified in FELA cases is in direct conflict with decisions of other State courts which have considered the issue. This important question should be expressly settled by this Court.

A conflict among courts of review of the several states as to their jurisdiction in reviewing FELA cases presents an independent ground for issuance of the writ of certiorari.

Almost every (if not every) State in the Union abides by the common law rule that the trial judge should grant a motion for new trial if the jury verdict is patently unjust or contrary to the overwhelming and manifest weight of the evidence. (66 C.J.S. *New Trial* §69 *et seq.*; 39 Am. Jur. *New Trial* §129 *et seq.*; *Wigmore on Evidence* (3rd

Ed., 1940) §2494; 48 Mich. L. R. 555.) And too, it has long since been held by almost every (if not every) State court of review that they have power to review the trial judge's determination of such a motion. (3 Am. Jur. *Appeal & Error* §890, p. 451; 5 C.J.S. *Appeal & Error* §1649, p. 536.) This supervisory power of the judiciary over the finality of jury verdicts in cases where the prevailing party has made out a *prima facie* case, has from early times gained universal acceptance as a salutary means of preventing the injustice of patently unreasonable jury verdicts. (See 24 Columbia L. R. 111 *et seq.*) In the words of this Court, the motion for new trial on the ground that the verdict is against the overwhelming weight of the evidence is a "classic mode of challenge". *Galloway v. U. S.*, 319 U.S. 372, 390-394.

In view of the widespread assertion of this power by the States in their systems of trial and appellate jurisprudence, it is only a matter of time before the question which divided the court below so violently is presented to the reviewing courts of every State in the Union. Yet there is no authoritative precedent from this Court; only ambiguous *Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940.

Several State appellate courts have already addressed the question of their powers in reviewing FELA cases, and in each instance the courts reached conclusions in direct conflict with the holding of the Illinois Supreme Court in the case at bar.

Recently the Supreme Court of Oklahoma held that in FELA cases:

> ". . . we have authority to examine the record, weigh the evidence and to determine whether the verdict and judgment should stand or whether it should be set aside and the cause retried . . . " *St. L.-San. F. Ry. Co.* v. *King*, 278 P. 2d 845, 848.

In 1956 the New Mexico Supreme Court had decided, in accordance with the majority of the court below, that its reviewing powers were impaired by the FELA. On rehearing the court undertook an extensive review of the law, and then retracted its prior conclusion:

> " . . . Upon a further consideration of the question, we believe that in cases arising in State Courts under the Federal Employers' Liability Act, 45 U.S.C.A. §51 *et seq.*, all procedural matters, including review of verdicts for excessiveness, are governed by the law of the forum and not by the Federal Decisional Law. This view finds support in nearly, if not all jurisdictions. The cases are so numerous, we will not list them . . . . " *Rivera* v. *A., T. & S. F. Ry. Co.*, 61 N.M. 314, 299 P. 2d 1090, 1093.

The District Court of Appeals of California has twice reached a conclusion in conflict with that of the court below:

> " . . . the enforcement of the legal rights given and declared by said federal act [the FELA] is committed concurrently to the state courts, and the act does not attempt to attach any conditions to the practice and procedure through which the jurisdiction of the state courts shall be exercised in the enforcement of such rights. *Taylor* v. *Southern R. Co.*, 350 Ill. 139, 182 N.E. 805. It follows, therefore, that the hearing and determination of the cause, not only in the trial court, but also on appeal, must be had in accordance with the rules, principles and precedents governing the practice in the state court . . . " *King* v. *Schumacher* (1939) 32 Cal. App. 2d 172, 89 P. 2d 466, 472, cert. denied 308 U.S. 593; followed in *Woodward* v. *So. Pac. Co.*, 35 Cal. App. 2d 130, 94 P. 2d 1028, 1032, cert. denied 309 U.S. 670.

Prior decisions of the Illinois courts conformed to these views, until in the case at bar the four-judge majority of the court below silently overruled these precedents and

set Illinois at odds with all the other States. See, *e.g.*, *Mitchell* v. *L. & N. Ry. Co.*, 375 Ill. 545, 551; *Taylor* v. *Southern Ry. Co.*, 350 Ill. 139, 146; *Parthun* v. *E. J. & E. Ry. Co.*, 325 Ill. App. 408, 411.

Future conflicts can be anticipated, especially since statutes and rules of court in many States impose a positive duty on reviewing courts to reverse unjust jury verdicts and require a new trial of the issues. For example, in upholding a rule of court which grants this power, the Supreme Court of New Jersey said recently:

> " . . . The appellate tribunal cannot invade the constitutional office of the jury; it may not merely weigh the evidence where it is fairly susceptible of divergent inferences and substitute its own judgment for that of the jury. But, if the verdict be so far contrary to the weight of the evidence as to give rise to the inescapable conclusion of mistake, passion, prejudice, or partiality, it cannot serve to support the judgment . . . As respects the appellate corrective process, there is no essential difference between a verdict that comes from misdirection and a verdict that constitutes a palpable perversion of the jury function . . .
>
> . . . . .
>
> " . . . The award of a new trial on appeal where the verdict clearly gives rise to the inference of mistake, passion, prejudice, or partiality does not constitute an undue interference with the constitutional right of trial by jury or the constitutional integrity of the inferior tribunal, for the jury has transcended its constitutional sphere to the substantial injury of the party adversely affected; and on the plainest principles of justice this fundamental error is remediable by the appellate process . . .
>
> "Whether a verdict is against the weight of the evidence, as thus defined, is in essence a judicial question that is generally deemed an integral part of the constitutional remedial appellate process. . . ." *Hager* v. *Weber*, 7 N.J. 201, 81 A. 2d 155, 159-160.

See also *Smith* v. *Times Pub. Co.*, 178 Pa. 481, 36 A. 296; *Gunn* v. *Union R. Co.*, 23 R.I. 289, 49 A. 999; *Hintz* v. *Mich. Cent R. Co.*, 132 Mich. 305, 93 N.W. 634; *DeCamp* v. *Central Arizona L. & P. Co.*, 47 Ariz. 517, 57 P. 2d 311.

One author who recently surveyed the entire area of "Substance and Procedure in State FELA Actions" (Hill, 17 Ohio St. L.J. 384, 403) concluded that "there has been, not unnaturally, much confusion" in reviewing courts as respects the proper function of judge and jury in determining FELA actions. However, the decision of the court below is, to our knowledge, the first in which the highest court in any State has held the FELA emasculates the jurisdiction of local appellate courts. Other State courts have held to the contrary. Undoubtedly the rest will sooner or later address the problem.

This case presents a far-reaching and important issue, arising out of the interpretation of a federal statute, which should be expressly settled by this Court. The orderly administration of justice in FELA cases in State courts will be settled only by a full opinion on the subject by this Court.

III.

In holding that the Federal Employers' Liability Act nullifies the power of State reviewing courts to determine whether the amount awarded by the jury is excessive, the Illinois Supreme Court has decided an important federal question in a way that conflicts with prior decisions of this Court and other State courts. This important question should be expressly settled by this Court.

The majority of the Supreme Court of Illinois made no reference to petitioner's contention, undecided by the Appellate Court, that the amount of the jury verdict was

so excessive as to require a new trial or substantial remittitur. Since it is the invariable practice of the Illinois Supreme Court to remand for rulings on such undetermined questions (Illinois Law and Practice, Vol. 3, pp. 207-209, Appeal and Error §958), its decision of necessity includes a ruling that this further aspect of appellate jurisdiction is nullified by the FELA when the Appellate Court reviews cases brought under the Act.

This holding is directly contrary to decisions of numerous other State courts, many of which are cited at R. 61, Petition for Rehearing, pp. 12-13. This Court refused to review four of these cases, (*L. & N. R. Co.* v. *Grizzard*, 238 Ala. 49, cert. denied 308 U.S. 603; *Hallada* v. *G. N. Ry. Co.*, 245 Minn. 581, cert. denied 350 U.S. 874; *Miller* v. *Terminal R. Assn.*, 349 Mo. 944, cert. denied 317 U.S. 678; *Crowley* v. *E. J. & E. Ry. Co.*, 1 Ill. App. 2d 481, cert. denied 348 U.S. 927), and expressly sanctioned this exercise of local appellate authority in *Union Pacific R. Co.* v. *Hadley*, 246 U.S. 330, 334, and *St. L. I. M. & S. R. Co.* v. *Craft*, 237 U.S. 648, 661.

No court, to our knowledge, has ever held that a verdict in any amount, however excessive, is not reviewable. This Court in *Neese* v. *Southern Ry. Co.*, 350 U.S. 77, does not so hold. Whatever restrictions the Seventh Amendment or the Judiciary Act impose on Federal courts of review on issues of fact, these restrictions have no application to State courts. *M. & St. L. R. Co.* v. *Bombolis*, 241 U.S. 211, 220.

Here again the Supreme Court of Illinois, by reading into the FELA what is not there, has surrendered a portion of the appellate power of Illinois courts which is of long standing and which is codified into Illinois statutory law. Ill. Stat. 1955, Ch. 110, §92(1)(c); App. 85A.

This Court should once and for all resolve these important and recurring problems of State court appellate jurisdiction in reviewing FELA cases. Until it does, confusion and conflicts will continue.

IV.

The interpretation placed upon the Federal Employers' Liability Act by the Illinois Supreme Court causes the Act to encroach upon the exclusive right of the State of Illinois, reserved by the Tenth Amendment, to prescribe and regulate the powers and jurisdiction of its courts. This new and undetermined question should be reviewed and settled by this Court.

Traditional partitioning of functions between our national and local governments precludes federal incursion by way of the Interstate Commerce Clause (United States Constitution, Art I, Sec. 8) into the matter of prescribing the jurisdiction and powers of State courts, which historically has been left exclusively to the sovereign States.

The Tenth Amendment to the Constitution of the United States, which provides

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

has been held to prevent any encroachment by the Federal Congress on the exclusive prerogative of the several States to fix and regulate the jurisdiction and powers of their own courts, and this without regard to the source of the rights in litigation.

In the early case of *Calder* v. *Bull*, 3 Dallas 386, Mr. Justice Chase wrote:

> "It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation, delegated to them by the state constitutions; which are not expressly taken away by the constitution of the United States. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice within each state, according to its laws, on all subjects not entrusted to the federal government, appears to me to be the peculiar and exclusive province and duty of the state legislatures: all the powers delegated by the people of the United States to the federal government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the state governments are indefinite; except only in the constitution of Massachusetts."

In the later case of *Brown* v. *New Jersey*, 175 U.S. 172, this Court said (p. 175):

> "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. *Ex parte Reggel*, 114 U.S. 642; *Iowa Central Railway* v. *Iowa*, 160 U.S. 389; *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U.S. 226 . . ."

In the recent case of *Missouri* v. *Maufield*, 340 U.S. 1, the same general principle was applied (p. 4):

> ". . . if a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control. This is true also of actions for personal injuries under the Employers' Liability Act. *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U.S. 377, 387. Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens*, a question of State law not open to review here."

The dissenting judges in the Court below noted that the majority had placed an unconstitutional construction on the FELA, saying (R. 50; App. 34A-35A):

> "... It is neither the prerogative, nor the intent, of Congress to regulate the jurisdiction of State courts, nor to control and affect their modes of procedure. *Herb* v. *Pitcairn*, 324 U.S. 117, 120; *Brown* v. *Gerdes*, 321 U.S. 178, 189; *Missouri* v. *Lewis*, 101 U.S. 22, 30; *Second Employers' Liability Act Cases*, 223 U.S. 1, 56."

Other State and Federal courts have reached the same conclusion with respect to the effect of the Tenth Amendment. *Central of Georgia Ry. Co.* v. *Jones*, 152 Ga. 92, 108 S.E. 618, 620, cert. denied 260 U.S. 729; *Gibson* v. *B. & N. Ry. Co.*, 213 F. 488, 490; *Reisenhoff* v. *Colonial Nav. Co.*, 35 F. Supp. 577, 579.

If the Congress has legislated that in FELA cases state reviewing courts must abdicate all their powers save to determine whether the plaintiff established a *prima facie* case, as is held by the majority of the Court below, it has transcended its legislative powers. By ascribing this radically sweeping effect to the FELA, the Court below has brought the Act into irreconcilable conflict with the mandate of the Tenth Amendment that reserves to the respective States, *inter alia*, the exclusive right to control and regulate the powers and jurisdiction of their courts.

Just as Congress may not "force a duty" on State courts to accept FELA litigation, it may not force the States to alter the fundamental jurisdiction and powers of their courts in adjudicating FELA cases.

This Court held in *Ableman* v. *Booth*, 62 U.S. 506, that the Supremacy Clause (United States Constitution, Art. VI, par. 2) cannot supply the missing authority, saying (p. 519):

> "... The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not

authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. . . ."

The majority of the Illinois Supreme Court has placed an interpretation on the FELA which brings it into direct conflict with fundamental constitutional principles. Its decision should not be allowed to stand.

Conclusion.

The issue in this case as to the effect of the FELA upon State appellate practice is of great significance to the People of every State in the Union. As reflected in the opinions of the courts below, there is genuine uncertainty in this important area of the law. We believe the holding of the majority of the Supreme Court of Illinois mistakes the intent of Congress, and is at variance with basic principles announced by this Court and the decisions of other State reviewing courts which have considered the question. The construction placed on the FELA by the court below causes it to invade the powers of the States reserved by the Tenth Amendment to the Federal Constitution. The point at issue deserves the attention of this Court to do away with the confusion and conflict that has crept into this area of the law.

Respectfully submitted,

FLOYD E. THOMPSON
JOSEPH H. WRIGHT
HERBERT J. DEANY
CHARLES J. O'LAUGHLIN
THOMAS P. SULLIVAN
ROBERT S. KIRBY
Attorneys for Petitioner

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AUG 12 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 366

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ELIZABETH B. BOWMAN, as Conservator of the Person and Estate of Charles Dale Bowman,
Respondent.

APPENDIXES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

FLOYD E. THOMPSON
CHARLES J. O'LAUGHLIN
THOMAS P. SULLIVAN
11 South LaSalle Street
Chicago 3, Illinois

JOSEPH H. WRIGHT
HERBERT J. DEANY
ROBERT S. KIRBY
135 East 11th Place
Chicago 5, Illinois
Attorneys for Petitioner.

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APPENDIX A

Judgment of Supreme Court of Illinois

Entered March 20, 1957. R. 58-59

Rehearing Denied May 20, 1957. R. 62

"And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings of the Appellate Court for the First District, as the matters and things

therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment of the Appellate Court for the First District, there is manifest error.

"THEREFORE, it is considered by the Court that for that error and others in the record and proceedings aforesaid the judgment of the Appellate Court for the First District, in this behalf rendered Be Reversed, Annulled, Set Aside And Wholly For Nothing Esteemed.

"And the Court having diligently examined and inspected as well the record and proceedings of the Circuit Court of Cook County as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment of the Circuit Court of Cook County is there anything erroneous, vicious or defective, and in that record there is no error.

"THEREFORE, it is considered by the Court that the judgment of the Circuit Court of Cook County, aforesaid, Be Affirmed In All Things And Stand In Full Force And Effect, notwithstanding the said matter and things therein assigned for error.

"And it is further considered by the Court that the said appellant recover of and from the said appellee costs by her in this behalf expended, to be taxed, and that she have execution therefor."

APPENDIX B

Opinion of Supreme Court

Filed as modified, May 20, 1957. R. 26-57.

Mr. JUSTICE BRISTOW delivered the opinion of the court:

This court has allowed plaintiff's petition for leave to appeal from a judgment of the Appellate Court reversing and remanding for a new trial a judgment entered by the circuit court of Cook County on a jury verdict awarding plaintiff damages under the Federal Employers' Liability Act in the amount of $200,000 for injuries sustained to plaintiff's ward, Charles D. Bowman, while in the course of his employment by defendant Illinois Central Railroad Company. The jury answered adversely to defendant this specific interrogatory: "Do you find by a preponderance of the evidence that at the time plaintiff's ward executed the release he was incapable of understanding what he was doing and unable to comprehend the terms and effect of the release?" The cause also presents plaintiff's motion for the issuance of this court's ancillary writ of *mandamus, certiorari,* or other writ to require the Appellate Court to strike the remanding portion of its order under section 75(2)(c) of the Civil Practice Act.

There are several distinct legal issues presented for our determination by this appeal. Whether under the terms of section 75(2)(c) of the Civil Practice Act (Ill. Rev. Stat. 1955, chap. 110, par. 75(2)(c)), the striking of a remanding order is mandatory upon the Appellate Court where the party whose judgment was reversed files the specified motion and affidavits, or whether the order may be stricken only where the judgment is reversed and remanded for insufficient evidence; whether the Appellate Court can weigh the evidence in reviewing Federal Employers' Liability Act cases; whether the jury verdict is

supported by the evidence; and whether the Appellate Court erred in its application of the law respecting the admission of certain evidence.

Before we can properly consider the questions of law relating to the merits of the cause, it is necessary to ascertain first whether the jurisdiction of this court can properly be invoked. Our appellate jurisdiction is prescribed by the Civil Practice Act, and section 75 authorizes petitions for leave to appeal from Appellate Court determinations. We will review such judgments, however, only where there has been a final appealable order. Defendant argues that since the Appellate Court has refused to strike the portion of its order remanding the cause for a new trial no final appealable order is presented, and that this court is without power to order the Appellate Court to finalize its judgment.

Plaintiff maintains that under section 75(2)(c), when the party whose judgment was reversed and remanded for a new trial by the Appellate Court files the requisite motions and affidavits, waiving a new trial and stating that he will be unable on a future trial to adduce other or additional evidence, it is mandatory for the Appellate Court to strike the remanding portion of its order; and that if the Appellate Court refuses to do so, the Supreme Court may, in aid of its appellate jurisdiction, issue the auxiliary writ of *mandamus* or *certiorari* to determine the questions of law presented in the cause.

This controverted section of the Civil Practice Act provides: "In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final judgment or decree entered in the cause in the trial court reverses said judgment or decree and remands the cause for a new trial or hearing, and in which the party in whose favor the trial court's judgment

or decree was rendered shall present to and file with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances than were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing. Thereupon it shall be competent for the Supreme Court to grant leave to appeal from said final judgment of reversal for its review and determination with the same power and authority in the case, and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section."

In support of his contention, plaintiff cites the original historical note appearing in the annotated volume of the statutes (Smith-Hurd Ill. Anno. Stat., chap. 110, par. 199, p. 68.) wherein the provision is interpreted as imposing a mandatory requirement upon the Appellate Court to strike the remanding portion of its order where a party files a motion supported by proper affidavits. Plaintiff also cites similar interpretations by other authorities on the Civil Practice Act. 5 Nichols, Ill. Civil Practice, 643; 23 Chicago Bar Record 237, 251.

In an article on Illinois practice, prepared by one of the draftsmen of the act, Albert E. Jenner, Jr., shortly after enactment of section 75(2)(c), it is stated: "Under the practice obtaining prior to the enactment of subsection 75 (2)(c) of the Civil Practice Act, a judgment of the Appellate Court reversing and remanding a case for a new trial could be made final for purposes of review by the Supreme

Court on petition for leave to appeal if the Appellate Court, in its discretion, on motion and affidavit of the party in whose favor judgment had been entered in the trial court, struck the remandment portion of its judgment. The applicant was required to state in the affidavit in support of his motion that he would be unable, on a further trial or hearing to adduce other additional evidence, facts or circumstances than were adduced on the trial resulting in the judgment reversed by the Appellate Court, expressly waiving his right to a new trial and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for a new trial or hearing be deleted and stricken from the judgment of the Appellate Court. The amendment of the Appellate Court judgment by striking the remanding portion of the judgment was entirely discretionary with the Appellate Court. Section 75 of the Civil Practice Act was amended by adding a new subsection (2)(c), codifying the foregoing practice, *except that the striking of the remandment portion of the judgment of the Appellate Court is made mandatory.*" (Ital. added.) 23 Chicago Bar Record 237, 251.

Defendant, however, in support of its contention that the striking of the remanding order is discretionary with the Appellate Court and should be exercised only where the cause is reversed on the ground of insufficient evidence, cites *Lyes* v. *Chicago and North Western Railway Co.*, 409 Ill. 536. In the *Lyes case* there were several charges of negligence, and the record did not disclose upon which ground plaintiff recovered in the trial court. On review, the Appellate Court held that a certain contract should have been admitted in evidence, and reversed and remanded the cause for a new trial. Upon plaintiff's motion, the remanding order was stricken. On appeal, the Supreme Court held that inasmuch as this contract, even if admitted

in the record, was not a defense to all of the charges in the complaint, therefore it was not possible to enter a final judgment in favor of the defendant in the cause, and consequently the striking of the remanding order was not proper. The court stated that the party seeking to strike the remanding order must present in his affidavit a question on which the Appellate Court can render a final judgment.

In the instant case, however, plaintiff has alleged a single basis for recovery, and defendant has interposed the defense of a release, which, if valid, would bar plaintiff's entire claim. The Appellate Court, as grounds for reversal, has found the evidence supporting the general and special verdicts, both favorable to the plaintiff, contrary to the manifest weight thereof, and that there were errors in the admission and rejection of evidence which tended to enhance the validity of the release; consequently, a final judgment for defendant could have been entered. Unlike the *Lees case* where the grounds for reversal by the Appellate Court involved a defense to only a part of plaintiff's claim, in the instant case the ground for reversal by the Appellate Court related to a defense which barred plaintiff's entire claim. Therefore, since a final order for defendant could be entered in the instant case, we cannot sustain defendant's contention that the *ratio decidendi* of the *Lees case* precludes the striking of the remanding order herein.

We are cognizant, however, of the further *dictum* by that court, relied upon by defendant, which would limit the application of section 75(2)(c) to cases where the cause is reversed and remanded for insufficient evidence. Plaintiff argues that this *dictum*, in no way necessary to the decision, is contrary to the terms and objectives of the statute, and would render section 75(2)(c) a nullity.

A careful reading of section 75(2)(c) reveals that by its terms it does not limit the right to strike the remanding order to cases where the Appellate Court reverses for insufficient evidence, or for any other particular grounds. The statute is all encompassing, and grants the right to strike the remanding portion of the order *in all cases* where the Appellate Court reverses and remands a cause for a new trial, provided the party in whose favor judgment was originally entered in the trial court files the requisite affidavit relinquishing the right to a new trial, and stating that he will be unable on a future trial to adduce other or additional evidence.

Not only does the section apply in plain, unequivocal terms to judgments reversed for whatever reason, but it gives the party whose judgment is reversed, and only that party, the right to decide whether to endeavor to eliminate the errors in a new trial, or to finalize the judgment by the procedure provided in section 75(2)(c), and take his chances of securing leave to appeal to this court.

Defendant argues with persistance that it is not only entitled to a reversal of plaintiff's judgment because of alleged errors, but to a new trial that is free from error, and that plaintiff cannot deprive it of that right by invoking section 75(2)(c) where there were errors of law in the trial.

This argument, while appealing as a statement of general principle, has no application to the issues in this case, since defendant, by plaintiff's waiver of a new trial, is deprived of absolutely no rights to which it is entitled. If plaintiff is willing to forego a new trial, in which more evidence may be offered and those errors of law which deprive plaintiff of her judgment may be corrected, then defendant enjoys the potential advantage that the Supreme Court may not grant plaintiff's leave to appeal, in which

case the Appellate Court's judgment in defendant's favor is final and disposes of the entire case. If leave to appeal is granted, and the Supreme Court holds that the Appellate Court's interpretation of the law is correct, the judgment in defendant's favor will be affirmed. In that event, defendant, who is spared the burden of a new trial, certainly has no cause to complain.

It is only where the Supreme Court conceivably holds that the Appellate Court erred in its interpretation of the law respecting the errors of the trial court that defendant could in any way be adversely affected. Under these circumstances, defendant should not have been entitled to the reversal and remandment in its favor by the Appellate Court in the first instance. Furthermore, in this event defendant would eventually have been adversely affected to the same extent, even if the remanding order were not stricken. For, after the so-called errorless trial, based upon the Appellate Court's incorrect interpretation of the law, this court would be still obliged to reverse the judgment.

The only possible advantage of which defendant may be deprived by plaintiff's waiver of a new trial under section 75(2)(c) is the tactical benefits of delay by forcing plaintiff to submit to a new trial, which is scarcely a right of which this court may take cognizance. Defendant cannot in good conscience accept judgment in its favor because of certain errors of the trial court, and at the same time complain because plaintiff is willing to accept the loss of her judgment in order to take the risk of securing review of those questions of law by the Supreme Court. It is therefore apparent that construing section 75(2)(c) according to its plain terms will in no way deprive defendant of any legal rights.

There is another and more cogent reason for rejecting defendant's contention that section 75(2)(c) must be limited only to cases reversed and remanded for insufficient evidence. It is clear from the statute that judgments finalized under section 75(2)(c) can be reviewed by this court only upon the same basis as other petitions for leave to appeal. Under section 92(3)(b) of the Civil Practice Act, the Supreme Court can examine cases brought to it by appeal from the Appellate Court as to questions of law only. Thus, even if a judgment of the Appellate Court is finalized under section 75(2)(c), this court could not review it if it merely raises the sufficiency of the evidence. *Olson* v. *Chicago Transit Authority*, 1 Ill. 2d 83.

Judgments reversed and remanded for insufficient evidence ordinarily raise only factual questions relating to the weight of evidence. Nevertheless, defendant would have this court restrict the use of section 75(2)(c) to just such cases, when it is clear that under such circumstances there would be no use for finalizing the judgment since it could never be reviewed by the Supreme Court because of the prohibition in section 92(3)(b).

If the evidence were so insufficient that a question of law would be presented, of which the Supreme Court could take cognizance, the Appellate Court should properly enter a directed verdict in defendant's favor rather than a remanding order, in which case there would be no need to invoke the procedure provided in section 75(2)(c).

It is our opinion, therefore, that the restricted application of section 75(2)(c), suggested in the *Lee's dictum*, and asserted by defendant, would render the statute a nullity and utterly defeat its remedial objectives.

It is significant, moreover, that no such limitation has been imposed by the other Appellate Courts under the practice obtaining both prior and subsequent to the enactment of section 75(2)(c).

In *Hartley* v. *Red Ball Transit Co.*, 344 Ill. 534, the Appellate Court, as in the instant case, reversed the judgment in favor of plaintiff because of errors of law in the submission of evidence. (259 Ill. App. 229.) With reference thereto the Appellate Court stated at p. 232: "In violation of this rule the contract went to the jury for construction, together with a mass of more or less irrelevant testimony touching the methods of the parties in conducting their business. * * * Complaint is made as to the rulings in evidence and remarks of the court upon the trial. Such errors, if any, will not likely occur upon the next trial." Despite the reversal for errors in the admission of evidence, the Appellate Court, upon plaintiff's motion, supported by an affidavit that plaintiff could not produce further evidence on a retrial, struck the remanding portion of the order, and the cause was heard by the Supreme Court on plaintiff's petition for leave to appeal.

In *Blanchard* v. *Lewis*, 414 Ill. 515, determined after the enactment of section 75(2)(c), the jury returned a verdict for plaintiff in a suit upon a contract, and the Appellate Court reversed and remanded the cause for a new trial for errors of law. (345 Ill. App. 246.) The Appellate Court stated: "We are, therefore, of the opinion that the admission of testimony having to do with events that occurred prior to the execution of the contract, the various exhibits having to do with the cancelation of powers of attorney, the testimony as to the bonds held by plaintiffs and the testimony as to the improper placement of bids at the tax foreclosure sale, was a clear violation of the Parole Evidence Rule (citations). The trial court erred in overruling plaintiff's objections to this line of testimony and in denying their motions to strike." Notwithstanding such errors of law in the admission of evidence, analogous to those alleged in the instant case, the Appellate Court allowed plaintiff's motion to strike the remanding order

under section 75(2)(c) and to have the judgment entered against him. Plaintiff thereafter filed a petition for leave to appeal, which was allowed by the Supreme Court to review such errors of law.

A similar procedure was followed in *Shaw* v. *Courtney*, 385 Ill. 559, and in *Corcoran* v. *City of Chicago*, 373 Ill. 567. It would serve no useful purpose to document this opinion further with all the cases where this procedure was followed. The only reference in the case law limiting plaintiff's right to have the remanding order stricken, as defendant suggests, appears in the *dictum* in the *Lees case*, which, as we have found, was in no way necessary to a proper disposition of that case.

Patterson v. *Warfield*, 233 Ill. 147, cited by defendant, has no application to this issue. The court therein construed a statute different from section 75(2)(c) in that it imposed upon the Supreme Court the duty to weigh the evidence, whereas section 75(2)(c) provides that judgments finalized thereunder should be reviewed on the same basis as other cases authorized for review, and in no way infringes upon the appellate jurisdiction of the Supreme Court.

On the basis of this analysis we believe that according to the literal meaning of the words of section 75(2)(c) the striking of the remanding order is mandatory upon the Appellate Court in all cases where the party whose judgment in the trial court was reversed and remanded files the requisite motion and affidavit. This interpretation renders the section consistent with accepted practice, and effectuates the undoubted legislative intent to streamline litigation and prevent costly and burdensome retrials of cases which may later be found to be predicated upon incorrect law. Consequently, the statute should be construed to achieve this laudable purpose, rather than reflect a hardening of procedural arteries.

Moreover, contrary to defendant's assertion, the imposition of this duty upon the Appellate Court does not interfere with the judicial function any more than any other requirement prescribing the appellate jurisdiction of a court which may properly be designated by the legislature. *Scott* v. *Freeport Motor Casualty Co.*, 379 Ill. 155.

Defendant contends further that we are without power or authority to issue the extraordinary writs herein to review the Appellate Court judgment. Upon plaintiff's filing a petition for leave to appeal after the cause has been decided by the Appellate Court, it was within our province to determine whether our jurisdiction was properly invoked. Although we have held, as defendant states, that a judgment reversing and remanding a cause for a new trial does not present a final appealable order (*Kavanaugh* v. *Washburn*, 387 Ill. 204; *Eckhardt* v. *Hickman*, 2 Ill. 2d 98, 103), nevertheless, where the Appellate Court, in disregard of the statute, has arbitrarily and contumaciously refused to finalize such order, this court has power in aid of its appellate jurisdiction to issue the appropriate extraordinary writ to bring the record before this court, and determine whether the inferior tribunal has exceeded its jurisdiction or proceeded according to law. *People ex rel. Stead* v. *Superior Court*, 234 Ill. 186; *People ex rel.* v. *Circuit Court of Cook County*, 169 Ill. 201; *People ex rel. Waber* v. *Wells*, 255 Ill. 450, 455; *People ex rel. Modern Woodmen* v. *Circuit Court of Washington County*, 347 Ill. 34.

It has been held that such power is not only inherent, but has been expressly conferred by the statutory provision authorizing this court to issue the extraordinary writs of *mandamus, habeas corpus, certiorari*, error and *supersedas*, and all other writs not prohibited by law which may be necessary to enforce the due administration of justice in

all matters within its jurisdiction. Ill. Rev. Stat. 1955, chap. 37, par. 43; *People ex rel. v. Circuit Court of Cook County*, 169 Ill. 201.

In the *Cook County Circuit Court case* it was stated: "The grant of the general power to exercise appellate jurisdiction would seem to imply the particular power to issue the writ of prohibition if it is necessary to the exercise of such jurisdiction." The writ was denied in that case only because the original order of the circuit court on the merits had not yet been considered by the Appellate Court, and therefore was not presented for review in the Supreme Court. In the instant case, however, the Appellate Court had entered a judgment on the merits, and plaintiff had filed her petition for leave to appeal from the judgment; consequently, there was a proper basis for the issuance of one of the extraordinary writs in aid of this court's appellate jurisdiction.

In *People ex rel. Stead v. Superior Court*, 234 Ill. 186, it was held that this court may direct the issuance of a writ of *certiorari* to protect its appellate jurisdiction where a lower tribunal entertained proceedings which were in derogation of a previous Supreme Court determination of the rights of the parties. The court protected its appellate jurisdiction by the issuance of the extraordinary writ of *certiorari*, notwithstanding the fact that the case was no longer pending before it. By the same token, it is equally appropriate that the extraordinary writ of *certiorari* be issued where the exercise of our appellate jurisdiction is jeopardized in the first instance by the arbitrary action of the Appellate Court hampering our consideration of the petition for leave to appeal.

The mere reiteration, in the cases cited by defendant, of the principle that a petitioner seeking the issuance of an extraordinary writ must allege facts showing affirmatively

that the petitioner is entitled to the relief asked does not constitute a basis for the denial of relief in the instant case, where it is patent that the action of the Appellate Court operates to usurp the appellate jurisdiction of this court to review questions of law. Admittedly, this court may not grant all petitions for leave to appeal, but the right to refuse such petitions rests with this court, and can neither be abdicated nor usurped by an inferior tribunal under the guise of refusing to strike a remanding order, so that its action is a shield preventing review of its errors.

It is therefore incumbent upon this court to consider the merits of the case and determine whether the Appellate Court erred in its application of the law.

Plaintiff contends first that the Appellate Court erred in its determination of the scope of appellate review of Federal Employers' Liability Act cases; while defendant maintains that the Appellate Court, in reviewing such cases, is in no way deprived of its inherent right to weigh the evidence, as in other cases involving jury verdicts.

It is established that the rights created under this Federal statute, including the right to jury trial which is a substantial part of the relief provided, are governed not by State law but by the decisions of the Federal courts, in order that the act be given uniform application. Hence, it has been held that such rights cannot be affected by "local rules of procedure." (*Dice* v. *Akron Canton & Youngstown Railroad Co.* 342 U.S. 359; *Brown* v. *Western Railway of Alabama*, 338 U.S. 294.) In this connection the court stated in the *Dice case*: "We also recognize in that case that to deprive railroad workers of the benefits of a jury trial where there is evidence to support negligence is to take away a goodly portion of the relief which Congress has afforded them. It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure.'"

If jury verdicts could be set aside according to local standards and rules of procedure in appellate courts, whereby the evidence is reweighed, as was done in the instant case, then the right to jury trial may be rendered impotent and lose its significance. Consequently, in accordance with the mandate in the *Dice case*, we are bound by the determination of the United States Supreme Court as to the province of the jury in such cases.

The scope of such appellate review of Federal Employer's Liability Act cases has been prescribed by the United States Supreme Court in *Lavender* v. *Kurn*, 327 U.S. 645, where the court stated: "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an Appellate Court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 67, 68; * * * *Tennant* v. *Peoria & P. U. R. Co.*, 321 U.S. 29, 35). See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act', 29 Marquette L. Rev. 73." The court went on to promulgate the rule: "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever

facts are inconsistent with its conclusion. *And the appellate court's function is exhausted when that evidentiary basis becomes apparent, * * *.*" (Italics added.)

That decision and rule of law were deemed controlling by the United States Supreme Court in a recent case arising in this jurisdiction and presenting the precise issue involved herein, as appears from the briefs filed in that case. (*Harsh* v. *Illinois Terminal R. R. Co.*, 348 U.S. 940.) In the *Harsh case* the Illinois Appellate Court reversed and remanded for a new trial a jury verdict and judgment in favor of an injured employee on the ground that the jury's finding of a violation of the Boiler Inspection Act was against the manifest weight of the evidence. (*Harsh* v. *Illinois Terminal R. R. Co.*, 351 Ill. App. 272). The Appellate Court then allowed plaintiff's motion to strike the remandment portion of the order, but the Illinois Supreme Court denied plaintiff's petition for leave to appeal. However, the United States Supreme Court, on a writ of *certiorari*, reversed the Appellate Court judgment and cited in support thereof *Lavender* v. *Kurn*, 327 U.S. 645, in a memorandum opinion filed after a regular hearing and the submission of briefs.

Although defendant argues that the United States Supreme Court reversed the Appellate Court decision in the *Harsh case* merely because it differed with the Appellate Court on the weight of the evidence, we are not so naive as to accept the theory that the United States Supreme Court would grant a writ of *certiorari* merely to reweigh the evidence. The briefs and arguments offered in that case at the original hearing, and on the petition for rehearing, certified copies of which have been filed with this court, presented squarely the issue of the scope of appellate review in a Federal Employers' Liability Act case,

and the court in reversing the Appellate Court on the authority of the *Kurn case*, held, in effect, that the Appellate Court was bound by the rule promulgated in that case, and erred in setting aside a jury verdict where there was an evidentiary basis for such verdict.

Moreover, this interpretation is consistent with other decisions of the United States Supreme Court defining the province of the jury and the reviewing court in Federal Employers' Liability Act cases. (*Ellis* v. *Union Pacific Railroad Co.*, 329 U.S. 649). Consequently, in adjudicating the merits of this case the Appellate Court was obliged to determine whether there was an evidentiary basis for the jury verdict.

The bulk of the evidence herein relates to the validity of the release entered into by plaintiff's ward, since the issue of negligence and liability were not disputed by defendant. The validity of that release, however, must be determined, not on the basis of local rules pertaining to fraud cited by defendant and the Appellate Court, but in accordance with the standard imposed by Federal laws under which such releases are scrutinized to be sure that they are not tainted by fraud or overreaching. Releases necessarily are a part of the administration of the Federal act and their validity must be determined according to the uniform Federal law. *South Buffalo Railway Co.* v. *Ahern*, 344 U.S. 367; *Dice* v. *Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359; *Marshall* v. *New York Central Railroad Co.*, 218 F.2d 900; *Graham* v. *Atchison, Topeka and Santa Fe Railway Co.*, 176 F.2d 819.

In *Graham* v. *Atchison, Topeka and Santa Fe Railway Co.* the Federal court quoted: "No release of this nature should be upheld if any element of fraud, deceit, oppression or unconscionable advantage is connected with the trans-

action. And in passing on the validity of such release when assailed all surrounding conditions should be fully developed and the relative attitude of the contracting parties clearly shown so that the jury in the clear light of the whole truth may rightly decide which story bears the impress of verity."

Inasmuch as both parties adduced an imposing array of witnesses, it will not be possible to summarize the testimony of each witness, but reference will be made to the tenor of their testimony in reviewing the sequence of events.

The occurrence in which plaintiff's ward was injured took place about 3:50 P.M., May 22, 1948, in the vicinity of Brown, Illinois, on the single-track line of defendant's railroad running between Evansville, Indiana, and Mattoon, Illinois. An extra train on the track, carrying some fifty cars, stopped in the vicinity of milepost 182, although there was no station there, and the flagman stated that he did not know what caused the train to stop. Train 296, on which plaintiff's ward, Charles Dale Bowman, was fireman, was traveling behind the extra train. When the engineer of train 296 saw the stopped train ahead, he set the air brakes in emergency, and told the men in the locomotive cab to get off. Being nearest the exit, Charles Dale Bowman jumped first, while the train was going about 35 miles per hour. The head brakeman jumped next, and then the two trains collided.

Shortly thereafter, Bowman was found at milepost 182, unconscious and bleeding from the head. He was taken to the Olney Sanitarium at about 5:15 P.M., unconscious, and was given close attention by the railroad doctor. It is not clear from the record just how long he remained unconscious, but it was at least until the fourth day. He was visited immediately thereafter by attorney H. J. Hasch, who later represented him in the execution of the release.

On June 15, 1948, examination by the attending doctor showed that Bowman was able to carry on a conversation with some aphasia. There was a weakness on the right side of his face and a sluggishness of the right pupil to reaction to light. X-ray films in June showed fractures of the 4th and 5th ribs with pleural infection and hemorrhages, and multiple fracture of the frontal skull bone, running in all directions, as well as a depressed fracture, indented ¼ to ½ inch, of the entire bone above the eye level. In this connection it appears that X rays taken on September 11, 1951, showed that this fracture of the frontal bone healed in a permanently depressed state. The depression of the skull in the frontal area could be felt with the hands. There was medical evidence that this injury exerted pressure upon the frontal lobes of the brain, which are the seat of the higher thought processes and which thus exert a special influence over the behavior and intelligence of the individual.

The report submitted on June 23, 1948, by the attending doctor, employed by the railroad, stated that it was possible that there was central nervous system residual, but he was unable to so state at the time; that the patient had not fully recovered; that he was unable to state with any degree of accuracy how much more treatment would be required; that the prognosis as to complete recovery to normal is questionable; and that a thorough neurological examination should be given the patient to evaluate the cerebral nervous system damage.

On June 28, 1948, Bowman was taken in an ambulance from the Olney Sanitarium to the railroad hospital in Chicago by the railroad claim agent. While he was hospitalized, Bowman failed to recognize either his mother or sister, or other persons who had known him for many years. Bowman was married on July 3, 1948, apparently to a new

acquaintance. On July 6, 1948, Harry G. Seibert, the district claim agent, with knowledge that Bowman had a claim pending against the railroad, took Bowman to the law firm in Mattoon which ordinarily represented the railroad, so that Bowman could consult with one of the firm lawyers concerning a replevin suit against his mother for his car, which apparently had been in her possession.

It appears further that on July 10, 1948, Bowman came to the back door of his sister's home, accompanied by a man who helped him walk. According to her testimony, Bowman's talk was rambling, his tongue thick and he had a stary look in his eyes. She refused, because of his condition, to give him the keys to the car.

The neurosurgeon, Dr. Oldberg, who saw Bowman at the request of the railroad chief surgeon, on July 13, 1948, reported that he felt that Bowman had not yet returned to his normal state, and recommended on August 25, 1948, that Bowman should be hospitalized for observation. Defendant's chief surgeon, Dr. Guy, stated in a report on the same date that Bowman manifested unusual mannerisms, a staggering gait, and slurring speech, and that he could not raise his right arm fully, and the report recorded him as a psychiatric problem and recommended that he be seen by a psychiatrist. Bowman was also examined at this time by Dr. Madden, a neurologist. He testified from his report to the company dated August 28, 1948, in which he found Bowman beset with a memory difficulty and with a judgment naive in character. He ventured only a tentative diagnosis of a post-concussion syndrome of moderate degree. During the months of July, August and September, including the time at which the release was signed, Bowman was under the care of Drs. Link and Zinschlag at Mattoon, Illinois. At the time of the trial, Dr. Link was deceased. Dr. Zinschlag was alive and practicing in Mattoon, but was not called as a witness by the defendant.

With reference to Bowman's conduct during the summer months of 1948, a number of witnesses, who had known Bowman and the family for many years testified that when they saw him after his injury he would repeat things over and over, that his appearance was like that of a child, that he would laugh without any apparent cause, and that it was difficult for him to find words.

The police captain testified that he found Bowman lost, sitting on the porch of a home. The man who rented the apartment to Bowman and his wife in July, 1948, testified that he noticed that Bowman was very nervous, that his conversation was clipped and hardly understandable, and that from his frequent observations of Bowman while he resided there between July and December, 1948, it was the witness's opinion that Bowman was not capable of entering into any business transactions.

In the latter part of August, 1948, Bowman and his wife went to the home of Marcus Glenn Stevens, of the Brotherhood of Locomotive Firemen and Enginemen, whose duties involved settling claims for union members who requested help. Stevens made appointments for Bowman with Dr. Link, and with Seibert, the railroad claim agent. When Stevens arrived at Seibert's office, he found that Bowman was represented by Hasch. According to the latter's testimony, he was employed by Bowman some three or four days after the railroad collision, while Bowman was in the hospital at Olney. Hasch also testified that Bowman came to him the early part of September, 1948, and said he believed he could get a settlement and wanted Hasch's help. Bowman, Hasch and Seibert discussed a settlement, but no agreement was reached. After Hasch and Bowman went out for a ride, they arrived at a figure of $15,000, from which Hasch was to get a fee of $2000. According to his

testimony, Hasch had never taken a statement of the case, nor interviewed a witness, and regarded as not very important the report he had received from Dr. Weber stating that Bowman had not returned to normal and recommending further examination.

Hasch and Bowman informed Seibert of their agreed demand, and Seibert telephoned the Chicago office and received immediate authority to settle. At 9:00 A.M. September 18, 1948, Bowman and Hasch returned to Seibert's office, where he prepared a release and resignation of Bowman as an employee of the defendant railroad. The documents, however, were executed in the conference room of the Central National Bank of Mattoon, in which building the railroad attorneys had their offices. Present on that occasion were Bowman Hasch, Seibert, the railroad counsel, and three female clerks.

The release differed from the regular release form in that it included a specific description of the accident; it was signed by both Bowman and Hasch, and contained a certification by two witnesses that it was read over and fully explained to Bowman by his attorney and assented to by both of them. Defendant's claim agent, a man of 31 years experience, stated that on no other occasion had the claim of an injured person, not yet in suit, been disposed of with a representative of the railroad's local law firm present.

The draft, payable to Bowman and Hasch, was delivered, and Bowman, after asking for $2730 in cash, paid Hasch $2000 and $75 to attorney J. E. Horsley for his services in the replevin suit. The witnesses present at the signing, called up from the bank, testified for defendant that they thought Bowman was mentally competent to conduct business. Some of them admitted, however, that they did not hear Bowman speak.

With refefence to Bowman's conduct after the execution of the release, defendant offered evidence that within a few weeks Bowman paid the balance due on his automobile, a $200 garage bill, bought a new car and trailer, which he later traded for a more modern one, and that in January, 1949, he sold a refrigerator. Defendant also offered testimony of several persons who saw Bowman in the latter part of 1948 and 1949 in the American Legion Hall, who stated that he acted normally.

Bowman's sister, however, testified that when she visited him in his trailer camp in December, 1948, he did not recognize her at first. He wondered where he was, was unable to carry on a conversation, went from one subject to another, and had difficulty finding words. She was not sure he was married, and his purported wife was not the kind of person with whom she would ordinarily associate.

Plaintiff testified that in January, 1949, Bowman returned home, acted like a ten-year old child, and she had to shave and wash him. Bowman was confined at the VA Hospital from July 8, 1949, until December 17, 1949. During his subsequent trial visits at home, plaintiff could not longer reason with him, and had him put in the Jacksonville State Hospital in 1951. She also adduced evidence that there was no history of mental illness in the Bowman family, and that he was in good health and mentally normal prior to the injury. Her testimony was corroborated by that of persons who worked with Bowman, and others who saw him prior to his injury, and by the fact that Bowman's physical examination by defendant at the time he was hired revealed no disability.

The medical history subsequent to the execution of the release reveals that in April and May of 1949 Bowman sought treatment at the neurosurgical clinic at Washington

University, where he saw Dr. Winokur, who testified for defendant that he found definite brain damage but no abnormality in thought processes. However, on July 8, 1949, the county court ordered that Bowman be committed to the VA Hospital in Danville for mental treatment. On August 14, 1951, an electro-encephalographic examination at the Jacksonville State Hospital indicated brain damage in the left hemisphere, and other examination at the hospital revealed paralysis of the right arm and leg, with abnormal reflexes, a weakness of the right side of the face, impairment of his speech and memory, and a diagnosis that he was suffering from a mental illness due to an organic brain injury.

On August 7, 1952, Bowman was adjudicated a mentally ill person incapable of caring for his own estate, and was ordered committed to the Department of Public Welfare for admission to the Jacksonville State Hospital, where he was found to be physically and mentally handicapped, particularly with reference to the right side of his body. He has been under doctor's care in the State hospital since 1952 and no improvement noted.

Dr. Siegel, who examined him in November, 1953, testified to many of the same mental and physical findings, and it was his opinion that the conditions which he found were permanent; that Bowman was incompetent from July, 1948; and that the occurrence in question was sufficient to cause the present state of ill-being in a hypothetical person.

Defendant introduced the testimony of two physicians and some seventeen lay witnesses to establish that Bowman was competent to transact business at the time of the settlement. From this evidence, it is clear that defendant knew Bowman had sustained a severe head injury, and that his faculties were in the process of deterioration at the time

the release was signed. After receiving the report of the first doctor concerning the gravity of Bowman's condition, it was advised in July by a neurosurgeon that the man had not yet returned to normal, and less than a month before the signing of the release this same doctor recommended hospitalization. So also a few weeks before the formal signing occurred, a company surgeon found that certain changes of significance were taking place so as to make Bowman a psychiatric problem. Indeed, in August and September, defendant's own claim agent was concerned as to whether or not Bowman had the mental ability to sign a release. At the time the release was signed Bowman was still under the care of defendant's district doctor, who did not testify although available.

Unless the testimony of Bowman's mother, sister, and many other persons who knew him before his injury, and saw him afterward, is disregarded, Bowman's failure to recognize his kin and friends, his halting speech, incoherent conversation, childish ways, euphoric attitude, and other symptoms of abnormality, together with the medical testimony of brain damage, constitute an evidentiary basis for the jury to find that he was not mentally competent at the time he executed the release.

That evidence, coupled with the further facts that defendant settled for $15,000 a case in which it regarded itself as liable, and in which the jury subsequently awarded $200,000 damages, that this settlement was made just three months after Bowman sustained multiple and depressed skull fractures, with knowledge from defendant's own medical reports of Bowman's brain damage, the full extent of which was not yet discernable, as well as knowledge of his peculiar behavior in suing his mother and marrying an apparently new acquaintance three days after being trans-

ferred by ambulance from the hospital at Olney, tends to indicate that this settlement was by no means free from overreaching.

Nor is that inference rebutted by the fact that Bowman could count out the cash to pay his zealous attorney, or sign his name to some checks made out by others; or by the fact that Bowman was represented by counsel, particularly that counsel was engaged some four days after the occurrence, when Bowman had barely regained consciousness, and such counsel admitted that he never investigated the case, nor interviewed witnesses, and disregarded the report of the attending doctor that Bowman had not recovered and needed a thorough neurological examination to ascertain the damage to his nervous system.

It is therefore clear, when "all surrounding conditions" are developed and the "relative attitudes of the contracting parties clearly shown," as required by the *Graham* case, that there was ample evidentiary basis from which the jury could find that there was some overreaching by defendant in procuring the release. The evidence was scarcely contradicted that Bowman was in a very serious mental condition which was caused by the admitted negligence of the defendant company. Three different doctors employed by the railroad had indicated in their reports that Bowman was not well mentally and that the prognosis, to say the least, was uncertain.

Moreover, the Appellate Court's attempt to isolate the issue of the validity of the release from the main case, in the order for a new trial, particularly where defendant did not request a severance in its briefs, is not only highly prejudicial to plaintiff's rights, but is contrary to law. As hereinbefore noted, the validity of the release is "but one of many interrelated questions." (*Dice* v. *Akron, Canton &*

Youngstown Railroad Co., 342 U.S. 339), and that "in passing upon the validity of such release when assailed, all surrounding conditions should be fully developed and the relative attitudes of the contracting parties clearly shown, so that the jury in the clear light of the whole truth may rightly decide which story bears the impress of verity." *Graham, v. Atchison, Topeka and Santa Fe Railway Co.*, 176 F.2d 819.

Thus, in the case at bar, the $15,000 settlement would be evaluated in a different light when it is shown that it was paid, not as a compromise of liability, but under circumstances of undisputed liability. Similarly, Bowman's competency at the time of the execution of the release can be better ascertained when the circumstances of the injury and sequence of treatment are known. Even the circumstances of the employment of Bowman's counsel and his conduct of the case cast light in determining the validity of the release negotiated and urged by that counsel. In our judgment, the truth respecting the release can only be ascertained by considering the cause in its entirety, otherwise Federal rights will be prejudiced. Again the Appellate Court was in error in exercising original jurisdiction on a question not properly before it.

The Appellate Court's opinion further refers to a host of errors of the trial court in the admission and rejection of evidence. The court held as error the admission of the opinion evidence on the mental competency of Bowman by plaintiff's lay witnesses McCoy, Foster, the police captain Ed Horn, and Hilton, even though they knew him for years prior to the injury, had occasion to see and talk to him after the injury, and described the way he appeared and acted. The court, however found no objection to the opinion evidence on the competency of Bowman by defendant's witnesses Myrtle Swaim and Betty Armentrout, who

saw Bowman for the first time when the release was executed, and who did not hear him speak a word, and who testified that he was normal and mentally competent. Nor did the Appellate Court object to the testimony of Clarence Miller respecting Bowman's mental capacity, although he did not know Bowman until the latter part of 1948 and 1949, when he saw him at the American Legion Hall.

Inasmuch as it is established that a lay witness may express an opinion as to mental competency (*DeMarco* v. *McGill*, 402 Ill. 46, 56; *Tyler* v. *Tyler*, 401 Ill. 435,) and since it appears from the record that plaintiff's witnesses sufficiently described the behavior on which their opinions were based, the admission of this testimony was not error.

The Appellate Court further objected to statements characterizing Bowman's behavior as childish, or like a child with a new toy, or like a ten-year-old child, on the ground that they were conclusions. However, this court has permitted descriptions of behavior despite the objections that they were mere conclusions, particularly where, as in the instant case, the characterizations are accompanied by descriptions of the context in which the behavior was set. (*People* v. *Hauke*, 335 Ill. 217; *People* v. *Hamilton*, 268 Ill. 396), and such rulings are in accordance with the general rule with reference to nonexpert opinions on the mental state of persons. 20 Am. Jur. sec. 823.

Nor is it clear to this court why the Appellate Court held that the testimony of policeman Horn was hearsay and erroneously admitted, when this witness testified from his own observation that he saw Bowman watching people while walking behind them, and that such persons complained to the witness, and that when he told Bowman about the complaints the latter would apologize to him.

The Appellate Court also held as error the refusal by the trial court to admit in evidence eleven checks signed by Bowman after the execution of the release, offered by defendant as evidence of Bowman's comprehension to engage in business transactions. The checks, however, were written in another hand, or typewritten, and were merely signed by Bowman. To be material on the issue of his competency, it would have to be shown that they were Bowman's acts, since it would tend to show incompetency rather than competency if someone else were attending to his business affairs and merely presenting him with checks to sign. It would be difficult to conceive this omission as prejudicial error. All of Bowman's activities, what he did, including transactions of any business, were described in detail.

The Appellate Court further held that the trial court erred in excluding Hasch's testimony of the "settlement" negotiations. Not only are matters relating to offers of compromise ordinarily inadmissible, (*Fenberg v. Rosenthal*, 348 Ill. App. 510, 517), but it is patent that the omission of such testimony would not constitute prejudicial error in view of Hasch's relation to the case. The circumstances of his procuring Bowman's case, his failure to conduct any investigation on behalf of his client, or to ascertain the extent of his client's injuries at the time he urged "settlement," even though he knew from the reports of defendant's own doctors that his client had not recovered and that he evidenced mental abnormality, rendered Hasch's testimony of limited, rather than decisive, value. Furthermore, the record does contain an ample measure of Hasch's testimony respecting the circumstances of the settlement: how Bowman decided to take the offer after he went for a ride with Hasch; how the figure of $15,000 was arrived at:

and how he (Hasch) agreed to take $2000 for his services. Were we to be technical, we could point out that this so-called error is not properly before us, since there is no offer of proof and only a colloquy between defendant's counsel and the court.

The Appellate Court also stated that reversible error was committed by the trial court in allowing plaintiff's witness, Dr. Berdach, to testify on the basis of subjective symptoms. The criterion as to whether a doctor may testify to subjective symptoms is whether the examination is made for the purpose of trial or for treatment. (*Shell Oil Co.* v. *Industrial Com.*, 2 Ill. 2d 590; *Cuneo Press Co.* v. *Industrial Com.*, 341 Ill. 569, 572), and since the record shows that the examination was part of the routine diagnostic procedure followed by the Jacksonville State Hospital preparatory to treatment, even though Bowman left the hospital at that time before treatment could be administered, the testimony of the doctor was properly admitted by the trial court.

Nor can we agree with the Appellate Court's holding that the trial court should have allowed defendant's motion to strike a portion of Kenneth Green's testimony on the ground that it was not proper impeachment. Inasmuch as defendant made no objection to such testimony until after cross-examination, when a motion to strike was made, the motion was properly overruled. (*Chicago Union Traction Co.* v. *May*, 221 Ill. 530). Moreover, the Appellate Court assigned a different reason for holding the testimony improper from that asserted by defendant when it belatedly made its complaint.

In adjudicating this appeal and ancillary motion, we have been obliged to consider numerous questions of law relating both to our appellate jurisdiction and to the merits

of the cause. As we have heretofore indicated, the jury, in answering the defendant's specific interrogation, found Bowman to be incompetent at the time the release was executed. The plaintiff contends that since the railroad failed to file a motion to set aside this finding, nor did it file a specific objection seeking relief from the special verdict, that the jury's verdict predicated upon the finding is unassailable. In view of our conclusion on the more important issues, we deem it unnecessary to resolve this contention. We have found that the Appellate Court erred in refusing to strike the remanding portion of its order in accordance with the mandatory requirement of section 75(2)(c) of the Civil Practice Act; that we may properly issue the extraordinary writ of *certiorari* in aid of our appellate jurisdiction herein; that contrary to the determination of the Appellate Court the scope of review of a jury verdict in a Federal Employers' Liability Act case is governed by Federal law and is limited to determining whether there is an evidentiary basis for the jury verdict, and that in the instant case there was an evidentiary basis for holding that the release interposed by defendant as a defense in this cause was tainted with overreaching and fraud, as defined by the Federal courts in Federal Employers' Liability Act cases; and that the Appellate Court erred in numerous assignments of error in the admission and rejection of evidence by the trial court. Consequently, we are constrained to reverse the judgment of the Appellate Court, and in accordance with the power conferred by section 92 of the Civil Practice Act, to reinstate the judgment of the circuit court of Cook County in favor of plaintiff.

Appellate Court reversed; circuit court affirmed.

JUSTICES SCHAEFER, HERSHEY, and DAVIS, dissenting:

We concurred in the unusual procedure by which this case was brought to this court, because of doubts we then entertained as to whether the Federal Employers' Liability Act required any change in our appellate procedure in reviewing jury verdicts.

In this case the plaintiff based his motion to strike the remanding order on section 75(2)(c) of the Civil Practice Act (Ill. Rev. Stat. 1955, chap. 110, par. 75 (2) (c)). But the Appellate Court found that new trial should be ordered because of numerous errors which, in its opinion, deprived the defendant of a fair trial. In such a case, it is clear that the Appellate Court is not obliged to strike its remanding order, and this court has so held. (*Lees* v. *Chicago and North Western Railway Co.*, 409 Ill. 536). We there held that the statute did not apply to a case where the question involved was the competency of evidence offered by the defendant to establish a defense, but excluded in the trial court. The Appellate Court ruled specifically that the trial court erred (1) in allowing plaintiff's lay witnesses to express an opinion as to Bowman's competency without a proper foundation being laid, (2) in permitting plaintiff's witnesses to testify to conclusions instead of facts from which the jury could properly evaluate the testimony and draw inferences from facts, (3) in admitting hearsay testimony, (4) in refusing to receive in evidence 11 checks issued by Bowman on the bank account established with proceeds of his settlement and used by him in various important business transactions, (5) in rejecting the testimony of Bowman's lawyer regarding conversations with Bowman during settlement negotiations, (6) in permitting physicians to testify to subjective symptoms, (7) in per-

mitting the plaintiff to attempt the impeachment of a defense witness on objectionable matters elicited on cross-examination, (8) in requiring defendant's claim agent to testify regarding the customary fee in contingent cases, and (9) in considering before the jury whether the defendant's officers had complied with a certain *subpoena duces tecum*. Because of the foregoing, the Appellate Court did not deem it necessary to discuss alleged errors relating to the conduct of plaintiff's counsel, the refusal of tendered instructions, and the amount of the verdict. We are convinced this court did not have authority to require the Appellate Court to strike its remanding order. Therefore, it is our opinion that leave to appeal was improvidently granted and we are without jurisdiction in the case.

We also dissent from the court's holding that the Federal Employers Liability Act has abrogated the traditional jurisdiction of our reviewing courts to set aside verdicts as being contrary to the manifest weight of the evidence. That jurisdiction is not only expressly granted by section 92(3)(b) of the Civil Practice Act, but is also a fundamental part of our procedure in the trial of jury cases under the common law. (*Olson* v. *Chicago Transit Authority*, 1 Ill. 2d 83; *Corcoran* v. *City of Chicago*, 373 Ill. 567). It in no way invades the traditional function of the jury, and has been embodied in our statutes for more than 100 years. (Ill. Rev. Stat. 1845, chap. 83, sec. 22; Laws of 1908, p. 460, sec. 83; *Mitchell* v. *Louisville and Nashville Railroad Co.*, 375 Ill. 545, 551; *Corcoran* v. *City of Chicago*, 373 Ill. 567, 571-574; *Voigt* v. *Anglo-American Provision Co.*, 202 Ill. 462, 465-466; *Chicago and Rock Island Railroad Co.* v. *McKean*, 40 Ill. 218, 221-222). It is neither the prerogative, nor the intent, of Congress to regulate the jurisdiction of State courts, nor to control and

affect their modes of procedure. *Herb* v. *Pitcairn*, 324 U.S. 117, 120, 89 L. ed. 789, 791; *Brown* v. *Gerdes*, 321 U.S. 178, 189, 88 L. ed. 659, 666; *Missouri* v. *Lewis*, 101 U.S. 22, 30, 25 L. ed. 989, 992; *Second Employers' Liability Cases*, 223 U.S. 1, 56, 56 L. ed. 327, 348.

Nevertheless, the opinion of the court has ordered the Appellate Courts of this State to retreat from their time-honored jurisdiction and abdicate the duties imposed on them by the Illinois legislature and the common law because of nebulous dicta contained in certain decisions of the United States Supreme Court. We have examined the cases cited by the court, as well as four recent cases, (*Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. ——, 1 L. ed. 2d 493; *Webb* v. *Illinois Central Railroad Co.*, 352 U.S. ——, 1 L. ed. 2d 503; *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370; 1 L. ed. 2d 404; *Ferguson* v. *Moore-McCormick Lines, Inc.*, 352 U.S. ——, 1 L. ed. 2d 511), and find that they involved final judgments which had been entered either taking the case from the jury, or reversing the jury verdicts without a remand. They did not involve the historical attribute of the common-law jury trial which permits a court to weigh the evidence and remand for a new trial. In short, these cases all involved a legal question of how much evidence is required under the Federal Employers' Liability Act to make out a *prima facie* case. They did not involve the procedural method of review and the supervision of the jury verdicts.

The present decision of our court reads into the memorandum of reversal in *Harsh* v. *Illinois Terminal Railroad Co.*, 348 U.S. 940, 99 L. ed 736, a mandate to abolish a substantial part of our local jury procedure and to abandon the statutory duties created by our legislature. We believe that such conclusion is totally unwarranted, and deny that

it is "naive" to assume that the United States Supreme Court would reweigh the evidence on *certiorari*. We rather suggest that to be the most logical interpretation of its opinion. See *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. ——, 1 L. ed. 2d 493; *Neese* v. *Southern Railway Co.*, 350 U.S. 77, 100 L. ed. 60; Certiorari Policy in FELA cases, 69 Harv. L. Rev. 1441.

We conclude that the court is over-cautious in believing that Congress has stricken down the procedural rights of State courts. Such a serious impingement upon the rights and powers of State courts should require a positive expression. When dealing with our traditional and historical legal procedures, we should be slow to find some unspoken compulsion of Federal law requiring their abolishment. *Cf. Missouri ex rel Southern Railway Co.* v. *Mayfield*, 340 U.S. 1, 95 L. ed. 3.

We find nothing in *Dice* v. *Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 96 L. ed. 398, to sustain this opinion. That case involved the validity of a release, and under Ohio procedure, such defense was tried solely by the court, without a jury. The vice condemned in that case was that Ohio "provided jury trials for cases arising under the Federal Act but seeks to single out one phase of the question of fraudulent releases for determination by a judge rather than by a jury." The United States Supreme Court merely determined that the right to a jury trial may not be denied "*in the manner that Ohio has here used.*" It is further clear that the Ohio court applied a State rather than a Federal standard to the evidence necessary to overcome a release. (*Dice* v. *Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 96 L. ed. 398). The narrow scope of the opinion is further evidenced by the court's reconciliation of *Minneapolis & St. Louis Railroad Co.* v. *Bombolis*,

241 U.S. 211, 60 L. ed. 961, holding that a State may provide for trial of cases under the act by a nonunanimous verdict. *Dice* v. *Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 363, 96 L. ed. 398, 404.

In *Missouri ex rel. Southern Railway Co.* v. *Mayfield*, 340 U.S. 1, 5, 95 L. ed. 3, 8, Mr. Justice Frankfurter speaking for the court, tersely expressing that court's attitude toward the excessive anxiety of State courts with reference to their obligations in cases arising under the Federal Employers' Liability Act, stated: "Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be free to decide the availability of the principle of forum non conveniens in these suits according to its own local law. To that end we vacate the judgment of the Supreme Court of Missouri and remand the cause to that Court for further proceedings not inconsistent with this opinion." The thought there expressed, regarding the availability of the principle of *forum non conveniens* according to local law, is applicable here to the question of local Appellate Court procedures.

Upon denial of a petition for rehearing the following additional opinion was filed:

PER CURIAM: Upon reconsideration of this cause pursuant to defendant's petition for rehearing, and the brief of *amici curiae* in support thereof, we wish to supplement our opinion to include the recent decisions of the United States Supreme Court which further substantiate our conclusions respecting the scope of appellate review of Federal Employers' Liability Act cases. In *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. ——, 1 L. ed. 2d. 493, and *Webb*

v. *Illinois Central Railroad Co.* 352 U.S. ——, 1 L. ed. 2d 503, the United States Supreme Court, in accordance with its disposition to allow *certiorari* in a great number of such cases (69 Harv. L. Rev. 1441, 1450), reaffirmed its consistent policy of construing the act to require a broadening of the jury's function.

In the *Rogers case* the Supreme Court of Missouri reversed and set aside a jury verdict awarding petitioner damages in a Federal Employers' Liability Act case upon the ground that the petitioner's evidence did not support the finding of the jury as to the railroad's liability. The United States Supreme Court reversed the Missouri Supreme Court, and explained that *certiorari* was granted in such a large percentage of Federal Employers' Liability Act cases because State courts deprived litigants of their right to a jury determination by failing to recognize that Federal Employers' Liability Act negligence actions are different from ordinary common-law negligence cases, and by not giving proper scope to the jury trial. The court emphasized that the jury trial is an integral part of the Congressional scheme, under which the verdict of the jury is decisive in all but the infrequent cases where reasonable men would not differ as to whether there was any evidence in support of the claim.

The court also noted that although the jury trial feature of the Federal Employers' Liability Act is not approved by those who would prefer a workmen's compensation act for railroad workers, nevertheless, inasmuch as Congress has not seen fit to substitute the present scheme, the court is obliged to effectuate the present Congressional intent by granting *certiorari* to correct instances of improper administration of the act, and to prevent its erosion by "narrow and niggardly construction." The court stated "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that makes it significantly different

from the ordinary common-law negligence action, has required this Court to review a number of cases. In a relatively large percentage of the cases reviewed the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme. We reach the same conclusion in this case. The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury."

The *Rogers case* was cited with approval in *Webb v. Illinois Central Railroad Co.* decided the same day, where the court reversed the judgment of the Court of Appeals which had set aside a jury verdict and reversed an award by the Federal District Court for damages under the Federal Employers' Liability Act.

These decisions are in accordance with *Lavender v. Kurn*, 327 U.S. 645, 90 L. ed. 916, and the other United States Supreme Court authorities cited in our original opinion. As noted therein, the court in the *Kurn case* promulgated the rule that the Appellate Court's function is exhausted where there is an evidentiary basis for the jury's verdict, and stated:

"Under these circumstances [where the facts and inferences were conflicting] it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. * * * Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

In the face of this mandate we cannot perceive how defendant can argue with conviction in the petition for rehearing that the United States Supreme Court apparently did not really mean what it said, and that the Illinois Appellate Court still retains its right to reweigh conflicting evidence and remand a Federal Employers' Liability Act case because it finds the jury verdict to be against the weight of the evidence. It is obvious that by such action the Appellate Court is substituting its judgment for that of the jury, just as it is when it directs a verdict, and consequently is invading the province of the jury, as defined in the foregoing United States Supreme Court cases.

However, defendant and the dissenting opinion herein endeavor to distinguish these decisions by limiting their application to directed verdict cases. Such an interpretation would not only distort the unequivocal language of the United States Supreme Court, but has already been rejected by that court in *Harsh* v. *Illinois Terminal Railroad Co.*, 348 U.S. 940, 99 L. ed. 736. Defendant, in its petition for rehearing, summarily dismisses that decision as ambiguous, and *amici curiae* claim it merely involved a reweighing of the evidence by the Supreme Court.

In the *Harsh case* the Illinois Appellate Court (351 Ill. App. 272) reversed and remanded a Federal Employers' Liability Act case on the ground that the jury verdict in favor of the employee was manifestly against the weight of the evidence, and for errors of law, as in the instant case. In justifying its action of weighing the evidence, the Appellate Court stated, at page 282:

"On petition for rehearing plaintiff contests, for the first time, the power of a reviewing court to consider the weight of the evidence in F. E. L. A. cases and to reverse and remand a judgment as against the manifest weight of

the evidence. It is contended that once such court determines that there is sufficient evidence in the record to support submitting the issues to a jury, it has exhausted its function with respect to weighing the judgment against the evidence. Numerous cases are cited and relied upon, principally *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. ed. 916, 66 S. Ct. 740; *Ellis* v. *Union Pacific Railroad Co.* 329 U.S. 649, 81 L. ed. 572, 67 S. Ct. 598; *Tennant* v. *Peoria & Pekin Union Railway Co.* 321 U.S. 29, 88 L. ed. 520, 64 S. Ct. 409; *Williams* v. *New York Central Railway Co.* 402 Ill. 494. * * * All of these cases deal with the questions of directed verdicts or judgments notwithstanding the verdicts and not with the reversal and remandment on the ground of a verdict against the manifest weight of evidence.

"Standing alone, language from these opinions appears to lend force to plaintiff's argument. However, considering each case in its entirety, it becomes apparent that they do not support plaintiff's position. In virtually all of them the reviewing court does in fact carefully detail and consider the evidence. Where it was felt the trial court or a reviewing court weighed conflicting evidence, or considered inferences as true which a jury had already rejected, the lower court's action in taking the case from the jury was disapproved. * * *

"Plaintiff has cited no authority, and we find none, which removes the reviewing court's historical power to reverse and remand a case for a new trial when it believes the verdict to be against the manifest weight of the evidence. The cases cited do illustrate the reluctance of the reviewing courts to disturb findings on issues that are based on credibility of witness. We find in these authorities, however, no such restrict rule of law * * *."

The United States Supreme Court granted *certiorari* to review this decision, and the briefs and arguments submitted in that proceeding presented the precise issue of the scope of appellate review in such cases, and whether the *Kurn case* was determinative.

The decision of the Illinois Appellate Court was reversed by the United States Supreme Court, which cited *Lavender* v. *Kurn* as the sole authority. If the United States Supreme Court merely differed with the Appellate Court on the weight of the evidence, as defendant and *amici curiae* contend, there would have been no need to cite *Lavender* v. *Kurn*, or any other case. Furthermore, since the Illinois Appellate Court had specifically rejected that case as an authority in its opinion, by advancing the same arguments as defendant has interposed herein, the action of the Supreme Court, in reversing the Appellate Court solely on that authority, which had been cited only in connection with this issue, signifies unmistakably that the *Kurn case* admitted of no such refinement as the Appellate Court endeavored to impose, but was applicable to the *Harsh case*, where the verdict of the jury was set aside as against the manifest weight of the evidence, as well as to directed verdict cases.

This interpretation of the *Harsh case* has been recognized and accepted by the Illinois Appellate Court for the Fourth District in the recent case of *Pennell* v. *Baltimore & Ohio Railroad Co.*, decided January 28, 1957, where the court stated: "The limited scope of review in railroad cases as set forth in the *Lavender case, supra*, is likewise determinative of any issue turning on the weight of the evidence. (*Harsh* v. *Illinois Terminal Railroad Co.* 351 Ill. App. 272, rev. 348 U.S. 940, rehearing denied, 348 U.S. 977.)"

This interpretation is in no way contradicted or limited by *Neese* v. *Southern Railway Co.* 350 U.S. 77, 100 L. ed. 60, cited by *amici curiae*. On the contrary, insofar as the United States Supreme Court held that the Court of Appeals erred in disturbing the action of the trial court, which was not without support in the record, this case tends to support plaintiff's rather than defendant's contentions on this issue.

Nor is our conclusion affected in any way by *Corcoran* v. *City of Chicago*, 373 Ill. 567, or the other Illinois cases cited by the *amici curiae*, inasmuch as those cases do not involve the Federal Employers' Liability Act, and consequently are not governed by the law set forth in the decisions of the United States Supreme Court respecting the scope of appellate review of jury verdicts in such Federal Employers' Liability Act cases.

Nor can defendant find support for its contention in the observations of Justice Frankfurter respecting the rights of State courts generally, inasmuch as Justice Frankfurter's interpretation of the applicability of State court rules in Federal Employers' Liability Act cases has represented for some years the minority view of the United States Supreme Court. *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 94 L. ed. 100; *Dice* v. *Akron, Canton & Youngstown Railroad Co.* 342 U.S. 359, 96 L. ed. 398; *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. ——, 1 L. ed. 2d 493.

Consequently, in the light of the decisions of the United States Supreme Court, which we are obliged to follow in construing such Federal rights, the Illinois Appellate Court herein was limited to determining whether there was an evidentiary basis for the verdict, and, as set forth in our original opinion, it was error to reweigh the evidence and set aside the jury verdict. This conclusion is in accordance

with the policy of the United States Supreme Court to prevent the erosion of rights conferred by the Federal Employers' Liability Act, particularly the right to jury trial, and to effect uniformity in the application of Federal rights. For, if the reviewing court could set aside the jury verdict by merely stating that it was against the manifest weight of the evidence, the right to jury trial could be set for naught.

The petition for rehearing reiterates defendant's contention that under section 75(2)(c) of the Civil Practice Act (Ill. Rev. Stat. 1955, chap. 110, par. 75(2)(c),) the remanding order should not be stricken by an Appellate Court where the prevailing party objects, and where the error can be obviated in a new trial. This contention has been amply considered and disposed of in our original opinion.

Nor do we perceive legal merit in defendant's latest argument that our interpretation of section 75(2)(c) of the Civil Practice Act, under which the Appellate Court is required to finalize a judgment where the moving party complies with the statute, would cause us to minimize errors and would bludgeon favorable decisions from us. Inasmuch as appeals from judgments finalized under section 75(2)(c) must be considered under the terms of the statute on the same basis as other appeals from final judgments, it is not clear how they would be entitled to, or could receive, special treatment as defendant suggests.

Moreover, defendant's interpretation of section 75(2)(c) would mean that the right of the losing party to finalize the judgment in order to appeal would be subject to the whim of the prevailing party, and so long as the latter objected to striking the remanding order, the judgment could not be finalized and no appeal could be taken. We cannot accept this perversion of the terms of section 75(2)(c) and of the prevailing practice.

The other points submitted by the petition for rehearing do not warrant further comment, and present no grounds for modifying the conclusions we originally set forth.

APPENDIX C

Opinion of Appellate Court

Filed March 5, 1956. R. 2, Appendix to Petition.

JUDGE NIEMEYER delivered the opinion of the court:

Defendant appeals from a judgment for $200,000 entered in plaintiff's action under the Federal Employers' Liability Act (45 U. S. C. A., sec. 51) for injuries sustained by her ward and son, Charles Dale Bowman (hereinafter called Bowman), a locomotive fireman employed by defendant, in jumping from a moving engine just before it collided with the caboose of a standing train. He was thrown against a cement milepost and suffered several broken ribs and a severe head injury. The defendant does not question on appeal its original liability for these injuries. The extent and effect of the head injury and the validity of a release executed by Bowman four months after the accident are the major matters in controversy.

The accident occurred on Saturday, May 22, 1948, near Olney, Illinois. Bowman was taken to the Olney Sanitarium for treatment. He was unconscious and remained in that condition until the fourth day when Dr. Lawrence F. Weber, the physician in charge, had his first conversation with him. On the following Sunday H. J. Hasch, an attorney practicing in Mattoon who had previously represented Bowman and later represented him in the settlement with defendant, visited him. Bowman's speech was rather halting and his memory was not too clear. Hasch saw him again during the week. He was greatly improved and talked more fluently. Gilbert Edward Tenison, Bow-

man's engineer and a witness for plaintiff, visited Bowman a week or ten days after the accident. Bowman talked with Tenison and seemed normal.

Plaintiff says in her brief that on May 29th Bowman answered questions intelligently, and on June 15th he carried on a fair conversation with an asphasia, or a hunting for words. The plaintiff, Niza Sims, her daughter and sister of Bowman, Emily Foster, his niece, and Bonnie Alexander, a friend of the family, were at the hospital on three Sundays. Each testified that Bowman did not recognize them on any occasion. Plaintiff testified that he did not talk, he muttered.

On June 23, 1948, Dr. Weber, a witness for plaintiff, reported to defendant that Bowman had not fully recovered; that prognosis as to complete recovery to normal was questionable; that in his, the doctor's, opinion the progress toward recovery had been satisfactory, but he believed it advisable for Bowman to have a thorough neurological examination to evaluate more accurately the cerebral nervous system damage (the hospital was not equipped to do that examination).

June 28th Bowman was transferred to the Illinois Central Hospital in Chicago. He left the Olney Sanitarium in an ambulance. At the request of defendant he saw Dr. Eric Oldberg, who specializes in neurology and neurological surgery. The doctor, testifying as a witness for plaintiff, said that he saw Bowman at his office in Chicago on June 30th. He did not examine him. He reported to defendant that Bowman was improving rapidly and wished to be discharged to recuperate at his home; that he, Dr. Oldberg, saw no objection to this; that he felt Bowman had not returned to his normal mental state and did not believe any final opinion regarding disability should be rendered at that time; that he should see Bowman approximately three months after the date of the injury.

Bowman was married July 3rd. The marriage caused a break in his family relations. His Pontiac automobile and his clothes were in the possession of plaintiff. Bowman went to his sister's home when plaintiff was there and asked for his car. Plaintiff testified that she did not let him have the car because he was in such bad health. She admitted that on a pre-trial deposition she had testified that she would not let him take the car because she was not certain they were married. She further testified on the trial that she turned over the keys of the car to the deputy sheriff the next day; that the deputy came later for Bowman's clothes; that for seven months thereafter she would just see Bowman on the street; he came home about February 1949; she, plaintiff, finally let his wife come to her home about three times. Niza Sims, Bowman's sister, testified that the first conversation she had with Bowman after he left the hospital was at the trailer where he was living with his wife in February 1949; that his wife was not the type of person that she would associate with; she, the witness, did not know that she had ever spoken to her; she, the wife, kept Bowman away from everybody.

Bowman was a few days late in his payments on the Pontiac. He went to James H. Ray, Sr., the district manager of the Chicago Motor Club at Mattoon, who had financed the purchase of the Pontiac and issued insurance on it, and told him that his, Bowman's, mother had locked up the car; he asked Ray what he could do to assist him in repossessing it. Ray told him to get a court order. After talking to Seibert, local claim agent for defendant, Bowman was introduced to Jack Horsley, a member of Craig & Craig, local attorneys for defendant, on July 6th. Horsley instituted a replevin suit against plaintiff and recovered the automobile and clothes.

On August 25th Seibert accompanied Bowman to Chicago where Bowman again saw Dr. Oldberg. The doctor did not examine Bowman. He testified that in cases of head injury a hospital examination would be necessary for him to reach a definitive opinion. Seibert talked with Bowman about going to the hospital, but Bowman would not go. On this trip to Chicago Bowman talked with Dr. Chester C. Guy, who testified for plaintiff. He was examined by Dr. John J. Madden, a witness for defendant.

Dr. Guy, chief of surgery at the Illinois Central Hospital three years at the time of the trial, had been connected with the hospital for about 27 years. He testified that he did not examine Bowman; he interviewed him August 25, and the records show that he saw him July 1st; that from his observation of Bowman and from what Bowman told him, he noted on his record that Bowman was a psychiatric problem and recommended July 1st that he be discharged to his home under the further observation of the local railroad doctors (Drs. Link and Zinschlag, conducting the Link Clinic); that Bowman did not want to stay in the hospital.

Dr. Madden's specialty is neurology and psychiatry. Having no independent recollection of examining Bowman, he testified from his report to defendant that he made a tentative diagnosis of a post concussion syndrome of moderate degree which will probably not permanently disable him. (The court struck the word "probably", leaving the rest of the statement standing.) The doctor further testified that it was his tentative opinion that Bowman would make an almost complete recovery within a period of approximately six months; that it is extremely difficult to predict the future in such head injuries as Bowman had, and that in his daily practice he wanted to know the history of the patient prior to the accident and to observe him on more than one occasion.

In the latter part of August Bowman and his wife came to the home of Marcus Glenn Stevens, chairman of the local grievance committee of the Brotherhood of Locomotive Firemen and Enginemen Railroad Union, part of whose duties was the settlement of personal injury claims of union members when they requested his help. Bowman told Stevens that he wanted to make a settlement. They talked about 15 or 20 minutes. Stevens saw him at least three or four times after that. Stevens made an appointment with Dr. Link, and Bowman and his wife went with Stevens to keep the appointment. After talking with Dr. Link, Stevens made an appointment for Bowman and himself in Seibert's office Monday, September 13. When Stevens got to Seibert's office Bowman was there with Hasch, his attorney. Stevens left. Hasch, a witness for defendant, testified that Bowman came to him the early part of September and said he believed he could get a settlement and wanted Hasch to help. Bowman, Hasch and Seibert discussed a settlement, but no agreement was arrived at. Hasch and Bowman then took a long ride. (The court refused to permit Hasch to tell his conversation with Bowman.) They tentatively arrived at a figure of $15,000. Bowman asked what Hasch's fee would be and was told $2,000. The next Friday, the 17th, they went to Seibert's office and submitted the figure. Seibert called Chicago and received authority to settle. Hasch and Bowman then said they wanted to talk about it further and would be back the next morning. About 9 o'clock Saturday morning, September 18th, they returned to Seibert's office and stated they had decided to make the settlement. Seibert prepared a release and a resignation of Bowman as an employee of defendant and wrote a draft for $14,730, the Railroad Retirement Board having served a lien for $270. Seibert said he would have to have witnesses to the release and suggested that they go to one of the banks. Bow-

man selected the Central National Bank. Mrs. Lucille Bowman, who had been with the bank 32 or 33 years and was cashier of the bank when the case was tried, was related to Bowman by marriage. Seibert called Horsley, who made arrangements for the use of a conference room at the bank for witnesses, and a notary public.

Present at the bank during all or part of the time were Bowman, Hasch, Seibert, Irma Wetzel (now Mrs. William Kidwell) and Myrtle Swain, employees of the bank who acted as witnesses, Betty Arnientrout, an employee of Craig & Craig, who acted as notary public, Horsley and A. D. Williams, then vice-president, now president of the bank. Seibert stated the purpose of the meeting, handed the papers to Hasch, who read them and told Bowman they were proper papers and handed them to him. Bowman read the release. Seibert asked if he understood it was a full settlement of all claims, and Bowman said yes. Seibert then asked him to write in the body of the release that he had read it and understood it. Bowman wrote as requested. No one told him how to spell. The papers were then signed by the parties, the witnesses and the notary public. The draft, payable to Bowman and Hasch, was delivered to them and endorsed. Bowman asked for $2,730 in cash and deposited the remaining $12,000. He counted out $2,000 to Hasch in payment for his fee, and $75 to Horsley for his services in the replevin suit.

Within a few weeks Bowman paid the balance due on the Pontiac automobile, paid a garage bill of $200 and bought a new Hudson car, paying $1530 in cash and receiving credit for $1230.61 on the Pontiac. In December 1948 he bought a trailer for $3800, and after several months, being dissatisfied because it did not have a bathroom, he bought a second, more modern trailer, receiving

full credit for the amount paid for the first trailer. January 3, 1949, he sold a Philco refrigerator for $200, receiving cash, executing a bill of sale and signing a receipt.

April 28, 1949 Bowman entered the neurosurgical clinic of the Washington University Hospital in St. Louis, Mo. He was examined for treatment on that day and again on May 3rd by Dr. Gerald L. Winokur, a neurosurgeon called as a witness by defendant. He testified to the history given by Bowman, including an account of his injury, his gradual and steady improvement to the time of the examination, with residuals of weakness of the right arm and leg, some difficulty in speech and inability to see out of the right side of his eye. The doctor found definite evidence of brain damage but no abnormality in so far as his thought processes were concerned. He discharged Bowman after the second examination with no neurological treatment—none was indicated. In his opinion Bowman was fully competent, alert and rational at the time of his examination.

July 8, 1949 Bowman was committed to the Veterans' Facility Hospital, Danville, Ill., on a finding of traumatic psychosis, as a person in need of mental treatment. In October 1949 plaintiff was appointed conservatrix of his estate and person. November 6, 1950 this suit was started. Defendant answered, denying the negligence charged and the injuries alleged. It also filed a special defense, setting up the release as a bar to the action. Plaintiff replied, alleging that on September 18, 1948, when the purported release was entered into, Bowman was mentally incompetent to enter into any contract of any kind or character and did not know the nature of the so-called release, and could not know the nature of it; that defendant knew of the mental incapacity and incompetency of Bowman to

enter into a contract, but its agent, H. G. Seibert, who was well aware of this condition, nevertheless obtained Bowman's signature to the "so-called release."

Defendant moved for judgment on the pleadings because plaintiff had not tendered or offered restitution of the $14,730 received by Bowman, or any part thereof, and in the alternative, in the event its motion for judgment was denied, defendant moved for a separate trial on the issue of the validity of the release. Both motions were denied. On the trial defendant moved for a directed verdict on the issue raised by the special defense at the close of plaintiff's evidence, and again at the close of all the evidence. These motions were denied.

The court submitted to the jury, at the request of defendant, the following interrogatory:

> "Do you find by a preponderance of the evidence that at the time plaintiff's ward executed the release he was incapable of understanding what he was doing and unable to comprehend the terms and effect of the release?"

The jury answered "yes," and returned a verdict for plaintiff, assessing his damages at $200,000. Judgment was entered on the verdict. Defendant moved for judgment notwithstanding the verdict, and in the alternative for a new trial. Among the grounds assigned for a new trial were,

> "37. The jury's finding on the given special interrogatory demonstrates that the jury disregarded and ignored the manifest weight of the evidence.
>
> "38. The jury's finding on the special given interrogatory demonstrates that the verdict should be set aside."

These motions were denied.

Before filing her brief plaintiff moved to strike that part of defendant's brief wherein it contends "The finding of the jury that Bowman did not understand the nature of the release is contrary to the manifest weight of the evidence," and wherein it contends "that the award of $200,000 is 'grossly excessive,'" assigning as reasons therefor that defendant did not preserve its objection to the special finding, and that the contention that the verdict is "grossly excessive" is not open for consideration in this court. This motion was taken with the case. By it plaintiff seeks a piecemeal determination of the objections raised by defendant on appeal. If the court should entertain the motion, there is no reason why similar motions could not be filed as to each contention made by the defendant, thereby unnecessarily increasing the work of the court and denying defendant the right of oral argument on each contention which plaintiff moved to strike. The portions of the brief complained of are not scandalous or impertinent. They do not violate any rule of the court. We know no other grounds for striking a brief or any part thereof. The motion is denied.

In support of its contention that the release is a bar to plaintiff's action, defendant argues that restitution of the consideration received by Bowman is a condition precedent to rescission, and that the finding of the jury that Bowman did not understand the nature and effect of the release is contrary to the manifest weight of the evidence. By her reply to the special defense plaintiff narrows the grounds for rescission of the release. There is no allegation of fraud in the execution of or inducement to the contract, except the implication of fraud in dealing with Bowman, knowing his mental incapacity, *Helberg* v. *Schumann*, 150 Ill. 12, 25-26; *Clay* v. *Hammond*, 199 Ill. 370, 377. The question raised is whether Bowman's incompetency and defendant's knowledge of it authorize rescission of the release without return of the consideration.

The validity of the release is to be determined by federal rather than state law, for "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, 361. Defendant insists that "the releases of railroad employees stand on the same basis as the releases of others" (*Callen* v. *Penn. R. Co.*, 332 U. S. 625, 630), and that, except in cases where the release is attacked for fraud in its execution, return of the consideration paid for the release is a condition precedent to rescission. It insists further, on authority of *Callen* v. *Penn R. Co.* (pages 630-1), that section 5 of the Federal Employers' Liability Act (45 U.S.C.A. sec. 55), which provides that "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void ** *," does not apply to the settlement and compromise of claims arising under the act.

A judicial opinion must be read as applicable only to the facts involved, and is an authority only for what is actually decided. *City of Geneseo* v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 519; *Cohens* v. *Virginia*, 6 Wheat. (U. S.) 264, 399. In the *Callen* case no charges of fraud in procuring the release were involved. The sole ground for setting it aside was the mutual mistake of the parties as to the permanency of plaintiff's injuries. The return of the consideration paid ($250) as a condition precedent to plaintiff's rescission of the release was not involved and was not decided. The statement in the opinion that a release "is not a device to exempt from liability" under section 5, was made in reference to the release before the court,—a release untainted by fraud. In the instant case

plaintiff charges that Bowman was mentally incompetent, and that defendant, knowing such incompetency, obtained his signature to the release. A release thus obtained before adjudication is voidable. (Ill. Rev. Stats. 1955, chap. 3, sec. 278.) Moreover, as hereinbefore stated, it is presumptively fraudulent. Defendant insists upon the return of the consideration of $15,000 as a condition precedent to plaintiff's right to attack the agreement as a bar to her action. If defendant's position is correct the employer will in most cases be exempt from liability no matter how meritorious the employee's claim, because the latter will, because of straitened circumstances, be unable to return the consideration which the employer has knowingly placed in the hands of an incompetent.

Section 5 was enacted to prevent this injustice. *Duncan* v. *Thompson*, 315 U. S. 1, establishes the application of the section to the situation presented here. Duncan, an employee having a right of action under the Federal Employers' Liability Act, entered into a contract under which in consideration of the payment of $600 to him he agreed in good faith to adjust and settle his case without litigation, and that if the claim was not so adjusted and he elected to bring suit, he would first return the $600, and that its return should be a prerequisite to the filing of any suit. He instituted suit. The trial court refused to make the return of the money a condition precedent to the suit and instructed the jury to credit the $600 on any verdict awarded Duncan. The Supreme court, in upholding Duncan's right to sue without returning the money, held that the language of section 5 includes agreements after the event of the injury, and said (p. 7):

> "The instrument prepared by the respondent for Duncan's signature purported to create a condition precedent to his bringing suit, the refunding of $600. By its terms, unless this condition were satisfied—and

> in view of Duncan's straitened circumstances the probability of satisfaction would seem negligible—Duncan's only means of enforcing such liabilities as should have been assumed by the respondent would be taken from him. Hence the agreement, if valid, would effectively exempt the respondent from liability under the act, no matter what the merits of Duncan's claim."

In *Irish* v. *Central Vermont Ry.*, 164 F. 2d 837, where plaintiff sought to avoid a release alleged to have been signed by him in reliance on the fraudulent representation of defendant's claim agent to try to get plaintiff a pension, the court said (p. 849):

> "If he must as a condition precedent to maintaining suit return what he was deceived into taking, he is as effectively deprived of his right to sue except upon that condition as though he had expressly so agreed, as did the employee in the *Duncan* case, *supra*. If this be so, what cannot be done by a fair agreement would follow by implication of law as the result of a fraudulent one, provided only that the latter is couched in terms of full and complete compromise. We leave undecided the effect of Sec. 5 as to a bona fide compromise and settlement. But we do hold that, if this release were obtained fraudulently by the appellee, it was within the broad scope of the phrase 'any * * * device whatsoever,' in Sec. 5 and consequently void. It follows that the plaintiff was free to attack its validity without restitution. *Duncan* v. *Thompson, supra*."

Upon the facts pleaded by plaintiff she was not required to return or tender the consideration paid Bowman as a condition precedent to attacking the release.

Plaintiff raises two objections to the right of this court to determine whether the answer to the special interrogatory and the verdict are against the manifest weight of the evidence. She first contends in her brief that sub-paragraphs 37 and 38 of defendant's motion for a new trial,

hereinbefore quoted, are not specific enough to preserve the objection. These sub-paragraphs specifically point out that the answer to the interrogatory disregards and ignores the manifest weight of the evidence. Under the decision in *Midden* v. *Allstate Ins. Co.*, 7 Ill. App. 2d 499, p. 508, this is sufficient.

Plaintiff next contends that the Appellate court cannot weigh the evidence in actions under the Federal Employers' Liability Act to determine whether a verdict is against the manifest weight of the evidence. This contention is based on the reversal of *Harsh* v. *Illinois Terminal R. Co.*, [351 Ill. App. 272] by the United States Supreme Court, 348 U. S. 940. This suit was instituted in the Circuit court of Madison county, Illinois by alleging a violation of the Federal Boiler Inspection Act. (45 U. S. C. A. secs. 22-34.) There was a judgment for plaintiff. The Appellate court held that the plaintiff's evidence required submission of the case to the jury, but that certain undisputed facts made the finding of the jury clearly against the weight of the evidence. The judgment was reversed and the cause remanded for a new trial. On petition for rehearing plaintiff contested for the first time the power of the court to consider and weigh the evidence in actions under the Federal Employers' Liability Act and to reverse a judgment and remand the cause as against the manifest weight of the evidence, and cited three United States Supreme Court decisions, including *Lavender* v. *Kurn*, 327 U. S. 645, and two Illinois cases. These cases dealt with questions of directed verdicts and judgments notwithstanding the verdicts, and not with reversals and remandments on the ground that the verdicts were against the manifest weight of the evidence. The petition for rehearing was denied and the Illinois Supreme court denied leave to appeal. On review by

the Supreme Court of the United States the judgment was reversed, the *per curiam* opinion reading: "Judgment reversed. *Lavender* v. *Kurn*, 327 U. S. 645."

The case of *Lavender* v. *Kurn* was an action under the Federal Employers' Liability Act brought in a Missouri state court. The judgment for plaintiff was reversed by the Supreme court of that state without remandment. The Missouri Court held that "plaintiff failed to make a submissible case * * *." The Supreme Court of the United States said (p. 652):

> "We hold, however, that there was sufficient evidence of negligence on the part of both the Frisco trustees and the Illinois Central to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury."

The opinion must be read as applicable only to the facts involved and regarded as authority only for what was actually decided. The right of a reviewing court to reverse a judgment and remand a cause on the ground the verdict was against the manifest weight of the evidence was not before the court. The decision is not authority on that question. We cannot accept the reversal of the *Harsh* case, without explanation, as a decision against the right of an appellate state court to review the evidence in accordance with the uniform state practice. In *Neese, Adm.*, v. *Southern Ry. Co.*; (October Term 1955) 350 U. S. 77, the court expressly abstained from passing upon the right of the reviewing court to consider the question of excessive damages and decided the case on the ground that the evidence did not warrant the Court of Appeals in disturbing the action of the trial court.

The case of *Stott* v. *Thompson*, 294 Ill. App. 450, cited by plaintiff, is not now an authority supporting her position. The holding in that case that the question of excessive damages was not for the consideration of the state

courts of review, was expressly disaffirmed by the same court (Illinois Appellate Court for the Fourth District) in *Avance* v. *Thompson*, 320 Ill. App. 406, 418-419 (1943), reversed on other grounds, and erroneously cited by plaintiff in support of her contention that the Appellate court cannot examine the evidence as to the excessiveness of the verdict. Mr. Justice Stone wrote the opinion in both cases. In the later case, speaking for the court, he said:

> "In the case of *Stott* v. *Thompson*, 294 Ill. App. 450, this court held that the question of the amount of damages awarded by the jury, in cases arising under the Federal Employers' Liability Act, is not for the consideration of the State courts, upon appeal. Upon a further consideration of this question, *it seems the better practice to consider the question of the excessiveness of the damages in this court.* In cases arising under the Federal Employers' Liability Act all procedural matters, including the admissibility of evidence, are governed by the law of the forum, *Central Vermont Ry.* v. *White*, 238 U.S. 507; *Brinkmeier* v. *Missouri P. Ry. Co.*, 224 U.S. 268; *Chesapeake & O. R. Co.* v. *De Atley*, 241 U.S. 310; *Chesapeake & O. R. Co.* v. *Kelly*, 241 U.S. 485; *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U.S. 211. *We will therefore consider the claim of defendant that the damages awarded by the jury, and the judgment of the trial court was excessive.*" (Emphasis added.)

The remandment of a case for a new trial, unlike reversal without remandment, does not take away the right of the parties to a jury trial as it existed in the beginning. *Sinopoli* v. *Chicago Rys. Co.*, 316 Ill. 609, 620. It is a matter of procedure, and so long as it is uniform in all cases it is not a federal question. *Missouri* v. *Mayfield*, 340 U.S. 1, 3-5; *M. & St. L. R. Co.* v. *Bombolis*, 241 U.S. 211, 220-223; *Central Vermont Ry. Co.* v. *White, Admr.*, 238 U.S. 507. Under the Illinois law it is the duty of the Appellate courts to reverse judgments and remand causes if the verdicts and

judgments are against the manifest weight of the evidence. As said in *Eilers* v. *Chicago Transit Authority*, 2 Ill. App. 2d 233, at page 236:

> "The question presented is whether the verdict and judgment are against the manifest weight of the evidence. That it was the duty of the trial court to grant a new trial if the verdict was contrary to the preponderance of the evidence and the duty of this court to reverse it if it is against the manifest weight of the evidence are well established propositions of law. Indeed, these duties of the courts are as much a part of the jury system as the duty of the jury to reach a verdict without bias or prejudice. No trial court has a right to shirk its duty in this respect, nor has the Appellate Court a right to disregard it."

The standard to be applied in testing Bowman's competency to execute the release is stated in *Sharkey* v. *Sisson*, 310 Ill. 98, where the validity of a deed was attacked. The court said (pages 112-113):

> "The test of mental capacity to make a deed is that the grantor must have sufficient mind and memory to comprehend the nature and effect of his act. * * The mind may be impaired incident to old age and disease, but if the grantor is able to understand the nature and effect of the business he is engaged in and is exercising his own will his acts are not invalid. (*Essary* v. *Marvel*, 274 Ill. 576; *Kelly* v. *Nusbaum*, 244 *id.* 158; *McLaughlin* v. *McLaughlin*, 241 *id.* 366.)"

The test refers to the time of the transaction. *Flanigon* v. *Smith*, 337 Ill. 572, 582. Proof of the mental condition for a reasonable time before or after the execution of the instrument attacked can be received only when it will tend to show such condition at the time of the transaction involved. *Lewis* v. *Deamude*, 376 Ill. 219, 221; *Milne* v. *McFadden*, 385 Ill. 11. The burden of proof was on plaintiff to show Bowman was mentally incompetent. *Campbell* v. *Freeman*, 296 Ill. 536, 539; *Callen* v. *Penn. R. Co.*, 332 U.S. 625, *supra*.

To support her charge plaintiff called nine lay witnesses, including herself, who testified to their observation of Bowman in the summer and fall of 1948. Four of these witnesses—plaintiff, Niza Sims her daughter, Bonnie Alexander, a long-time friend of the family, and Vernon Branson, a retired police officer—expressed no opinion as to Bowman's competence. Objections were made to the giving of opinions by McCoy, Mrs. Foster, Bowman's niece, Horn and Hilton. Defendant contends that the testimony of none of the witnesses for plaintiff is entitled to any weight.

Don H. McCoy operated a drive-in restaurant in Mattoon from September 1947 to March 1949. He knew Bowman approximately 28 years. During the summer of 1948 Bowman would come into the drive-in and eat. He had a wild expression in his eyes and gave incoherent answers to questions. Over objection McCoy testified that in his opinion Bowman was unable to transact any business during the summer of 1948 and continuously until March 1949. On cross-examination he testified that at times Bowman did not have money with him and promised to pay the next day; that he always paid the correct amount; that he, the witness, did business with him.

Emily Foster, Bowman's niece, testified that after Bowman left the Olney Sanitarium she next saw him about July 1, 1948 when he came to her mother's home for the keys to his car. He had a glazed or glassy look and his speech was incoherent. During the summer she saw him only when she ran into him on the street, and one time he didn't recognize her until she told him who she was. Over objection she testified that Bowman was definitely not capable of entering into business transactions.

Ed Horn, captain of police in Mattoon in December 1948, testified that at 12:27 a.m., December 14th, he talked to Bowman about 20 minutes in his trailer in Mattoon. Bowman said his wife had left him and he wanted the police to locate her. He described his wife and told where he thought she might be. He had a stary look, his eyes were glassy and in his talk he would repeat himself and would not get off the subject about his wife. Horn testified over objection that at the time he thought Bowman was very incompetent. On redirect examination he testified that he never knew Bowman to be abnormal mentally in any way.

Marvin Hilton, a former intercity bus driver, knew Bowman before his accident—not personally but they talked. He testified that the first time Bowman got on his bus in 1948 after the accident he had a disturbed look and the driver thought he might be drinking. He caused no trouble at any time on the bus. The unusual things the witness noticed were his look and the way he handled himself—practically useless, mostly on the right side. He did not have a long conversation with Bowman. He testified over objection that based on his observation of Bowman and his conversation with him he would say Bowman was mentally ill, very much so.

Clark Brady, a farmer and former client of one of plaintiff's attorneys in the trial court, testified in rebuttal that he knew Bowman since Bowman became a tenant in July 1948 in his, the witness' farm building, converted into flats in a rural area southeast of Mattoon. Over objection he was permitted to testify that he talked with Mrs. Bowman about Bowman's mental condition, without detailing the conversation, when they came to rent the flat. He testified that he noticed Bowman was very nervous, his eyes

shifted and his conversation was chipped. You could hardly understand him when he moved in, but he got a little better after he was out there two or three months. Bowman did not discuss any single subject in an intelligent manner throughout the time the witness knew him. In his opinion Bowman was not capable of entering into a business transaction. The longest conversation the witness had with him was five or ten minutes.

Vernon Branson, a retired police officer, testified that after the accident Bowman was kind of stary-eyed and once or twice he thought Bowman didn't know him in the summer and fall of 1948. In talking he would start on one thing and run off to something else. Bowman would laugh out loud without apparent cause and run off at the mouth. Between July 1948 and Bowman's adjudication (as a person in need of mental treatment) in July 1949 the witness noticed nothing unusual about his behavior. He was not asked to give his opinion.

The remaining witnesses, who were not asked to express an opinion, are family witnesses. Plaintiff, Niza Sims her daughter, and Bonnie Alexander, a friend of the family for many years, testified that Bowman had a stary look, difficulty in speech, incoherent conversation and failure to recognize them. They had no contact with Bowman, except as they saw him on the street, from the time he came for the keys to the car in early July until February 1949. It does not appear that they discussed business matters or had any extended conversations with him.

The basis for the introduction of an opinion of a nonexpert witness as to the mental unsoundness of a testator, grantor or, in this case, a releaser of a claim, has long been established and frequently stated. In *Teter* v. *Spooner*, 279 Ill. 39, 45, a will contest, the court said:

"The opinion of a non-expert witness that a testator is not of sound mind and memory is entitled to no weight where he states no facts or circumstances which could induce a reasonable belief of unsoundness of mind. *Before giving such opinion he must detail the facts and circumstances upon which he bases his opinion. Brainard* v. *Brainard,* 259 Ill. 613." (Emphasis added.)

This is because "It is the province of witnesses in a case of this kind to give the jury the facts within their knowledge, and it is the province of the jury to form an opinion as to the inferences to be drawn from these facts." See also *Hettick* v. *Searcy,* 278 Ill. 116, 121, and *Milne* v. *McFadden,* 385 Ill. 11, 13. Tested by these rules the foregoing testimony of witnesses expressing an opinion that Bowman was mentally incompetent to transact business is entitled to no weight. McCoy says Bowman gave incoherent answers to questions; Mrs. Foster, that his speech was incoherent. Neither gave any details of conversations or any facts from which they reached the conclusion of incoherency to which they testified. The jury was left without any facts by which to weigh their testimony. For the same reason the testimony of Clark Brady is without weight. Horn based his opinion on Bowman's actions on the night his wife left him. His agitation on that occasion affords no reasonable basis for an opinion as to his capacity three months earlier to understand the nature and effect of a transaction concluded after almost a month of negotiations during which he was consulting with his union representative or his lawyer. Moreover, Horn testified on redirect examination that he never knew Bowman to be abnormal mentally in any way. His testimony destroys itself. Hilton, the bus driver, did not disclose the subjects or details of his conversations with Bowman, none of which was long.

He testified to a single incident of abnormal behavior when he thought Bowman might be drinking. He does not testify, and there is no evidence, that Bowman had not been drinking. This testimony lacks probative value.

Plaintiff supplements the foregoing testimony with the opinion of Dr. Joshua Speigel, a neurosurgeon, called as a medical expert by her. He examined Bowman November 10, 1953 at the request of plaintiff's attorney. In answer to a hypothetical question he said he did not believe Bowman could have been competent from July 1948 on. In speaking of the testimony of physicians, not medical experts, the Supreme Court said in *McGregor* v. *Keun*, 330 Ill. 106, 118:

> "It has never been held in this State that the testimony of doctors upon the subject of mental capacity is entitled to any greater weight than that of laymen who are men of good common sense and judgment."

The testimony of an expert medical witness is put on a lower plane. As said in *Opp* v. *Pryor*, 294 Ill. 538, 545:

> "That class of evidence, however, is generally discredited and regarded as the most unsatisfactory part of judicial administration. This is with good reason, because the expert is often the hired partisan and his opinion is a response to a pecuniary stimulus. * * * The field of medicine is not an exact science, and the expert being immune from penalties for perjury, his opinion is too often the natural and expected result of his employment."

Moreover, Spiegel's opinion, formed on the basis of plaintiff's evidence, becomes worthless and misleading when considered in connection with undisputed facts of business transacted by Bowman, including the negotiation and settlement of his claim against defendant, the disposition of the proceeds of the settlement, the subsequent purchase of an automobile and two trailers, receiving the full price paid for

the first trailer on the purchase of the second, hereinbefore described, and of other business transactions hereinafter referred to. Opinions yield to facts.

The deficiency in plaintiff's testimony is not aided by the testimony of Doctors Weber, Oldberg and Guy, hereinbefore stated. Neither witness testified to a fact or circumstance indicating incapacity to transact business or expressed an opinion on the subject. Dr. Oldberg, the only neurosurgeon among them, refused to give a definite opinion as to the extent or permanency of Bowman's injury without hospital observation. Dr. Guy, without examination, merely described him as a psychiatric problem. Dr. Weber gave his attention to the treatment of Bowman's physical injuries while in the Olney Sanitarium and merely expressed an opinion that a neurological examination should be had.

The order of July 8, 1949 committing Bowman to the Veterans' Facility Hospital at Danville, Illinois on a finding of traumatic psychosis as a person in need of mental treatment, is not evidence of mental illness or incompetency. (Ill. Rev. Stats. 1953, chap. 91½, sec. 5-11, par. 3.) The order of commitment of August 7, 1952, almost four years after the execution of the release, is too remote to be of any probative value. *McGregor* v. *Kean*, 330 Ill. 106, 116, *supra*.

In opposition to the insufficient evidence on plaintiff's behalf, defendant introduced the testimony of two physicians and seventeen lay witnesses. The testimony of Doctors Madden and Winokur need not be repeated. Dr. Madden, after an unsatisfactory and incomplete examination, gave a tentative opinion that Bowman would make an almost complete recovery within a period of approximately six months after August 1948. Dr. Winokur, testifying to the results of examinations of Bowman at the neurological

clinic of the Washington University Hospital at St. Louis, Missouri with n eight months after the settlement, made for the purpose of treating him, expressed an opinion that Bowman was fully competent, alert and rational at that time.

The undisputed evidence shows that at all times during the negotiation and completion of the settlement with defendant Bowman was exercising his own will. He initiated the settlement by talks with Stevens, the union representative, shortly after the middle of August, and actively participated in every step taken thereafter—selected the bank where the transaction was closed and disposed of the proceeds of the settlement in an intelligent and competent manner, paying $2000 to Hasch for his services in the settlement, $75 to Horsley for instituting the replevin suit against his, Bowman's mother, and putting on deposit $12,000. The settlement was made when the full extent of Bowman's injury had not been ascertained by the doctors and before the great deterioration in Bowman's condition claimed by plaintiff, had manifested itself. It was made in Bowman's home town, a nonmetropolitan community, where, the courts take judicial notice, the awards by verdicts and judgments in personal injury actions are far below the amounts awarded in Cook county. The reasonableness of the transaction must be judged by the conditions at the time and place of the transaction and not by subsequent events or the more favorable conditions that could be presumed had the settlement been originally negotiated in Cook County. Seibert testified he had been settling cases in Mattoon and around Illinois for thirty-one years, and the Bowman settlement was one of the largest he ever made.

Stevens, who opened the negotiations for settlement with Seibert, and Hasch, Seibert and Horsley, who were present at the bank when the settlement was completed, had pre-

viously had business transactions with Bowman. Stevens, the union representative, had many contacts with Bowman since his employment by defendant in 1945. He had helped in the settlement of a minor personal injury claim of Bowman in the latter part of 1947. After discussing with Bowman, at his request, the settlement with defendant, he went with Bowman and his wife to talk with Dr. Link, to whom Bowman had reported for observation, and, after the talk with Dr. Link, called Seibert, the claim agent, for an appointment. He dropped out of the negotiations when Bowman appeared with Hasch as his attorney.

Hasch had represented Bowman in an important matter in 1947, having been employed by Mrs. Sims, Bowman's sister, and in other matters. He had been employed to represent Bowman in handling his claim against the defendant while Bowman was a patient in the Olney Sanitarium. He had talked with Dr. Weber at Olney, and before the settlement had contacted Dr. Zinschlag, a local physician, at the request of Bowman. He had talked with Bowman professionally and socially since Bowman's accident.

Seibert had settled a minor personal injury claim of Bowman in 1947; had talked with him in the Olney Sanitarium and on his trips to Chicago where he saw Doctors Oldberg, Guy and Madden. On September 11, 1948 Seibert had Bowman examined by Dr. Link and received a favorable report, the sum and substance of which was that Bowman was mentally capable of transacting business. Dr. Link died before the trial.

Horsley, a practicing attorney and member of the firm of local attorneys representing defendant after suits were brought in personal injury matters, met Bowman in early July and instituted the replevin suit for Bowman's automobile and clothes. Each of these witnesses testified positively that in his opinion Bowman was mentally competent

to transact business and that he knew the nature and effect of the transaction in which he was settling his claim against the defendant.

Williams, vice president of the bank, first met Bowman on the morning of September 18, 1948 when the transaction between Bowman and defendant was closed. He was not paying any particular attention to Bowman so far as his mental condition was concerned; he didn't notice anything of an abnormal nature—it was just a regular business transaction. Bowman endorsed defendant's draft, opened an account with the bank by depositing $12,000 and received $2730 in cash. Bowman drew checks on the account and closed it out by check for the balance $8960.00, payable to the National Bank of Mattoon, to which the account was transferred. Williams' conduct in handling the Bowman account is consistent only with belief in Bowman's competency. The two employees of the bank and the notary public in the office of Horsley each testified that in their opinion Bowman was competent to transact business.

James H. Ray, Sr., the district manager of the Chicago Motor Club, testified as hereinbefore mentioned to having financed Bowman's purchase of a 1941 Pontiac car and issuing insurance on it in February 1948, and of Bowman's request in early July, when back a few days in his payments, if Ray could do anything about getting his, Bowman's, car from his mother. Ray further testified that in October 1948 Bowman paid the full amount due on his Pontiac and later came in to inquire if his living in the trailer camp in Decatur would affect his insurance, and made the necessary adjustments to keep the insurance alive. This witness noticed nothing abnormal about Bowman in so far as his mind was concerned after the accident and was of the opinion that he was definitely mentally capable of entering into business transactions.

Hal C. Ross, a Hudson car dealer in Mattoon from 1945 to May 1950, sold Bowman a 1941 club coupe in 1946 and a secondhand Pontiac in February 1948; saw him in the garage at different times in August or September 1948 when Bowman told him of his accident, said he was back in Mattoon, feeling good, and would probably want another car. October 2, 1948 Bowman bought a new Hudson coupe, paying $1530 by check and being credited with $1230.61 on his Pontiac car. Bowman also paid a garage bill of $200 by check. Ross testified that there was nothing abnormal about Bowman's conversation; that he, the witness, was able to have intelligent conversations with Bowman and understood what he was saying, and during that period Bowman was mentally capable of entering into business transactions.

Mrs. Dorothy Bennett, an operator of a trailer court and sales agency in 1948 and 1949, met Bowman and his wife in November or early December 1948. They came to look at house trailers on her lot. Bowman looked over the trailers to see the construction of the framework, came back three or four times. On these occasions they discussed the various trailers. The witness sold Bowman a trailer the early part of December and Bowman and his wife moved into it on the trailer lot. Bowman was dissatisfied because the trailer was nonmodern. He went to Decatur, where the principal office of the sales agency was located, to look at other trailers, and finally bought a second trailer, receiving as credit on the purchase price the full amount paid for the first trailer. On January 3rd Mrs. Bennett bought a ten-foot Philco refrigerator from Bowman, paying $200 cash and receiving a receipt signed by him. The Bowmans were on the trailer court from December 6, 1948 to May 6, 1949, Bowman paying the weekly rental regularly. During that time she did not notice anything abnormal so far as Bowman's mind was concerned. He was

able to discuss intelligently the subjects they talked about. He understood and knew the nature of the transactions he had with her and was in her opinion mentally capable of transacting business.

Mrs. Estelle Gammill, a neighbor of the Bowmans at Clark Brady's place outside of Mattoon until the latter part of September or first part of October 1948, testified that she noticed nothing unusual about Bowman so far as his mind or mentality was concerned; he did not have a blank or stary look; she saw him drive his Pontiac car, and he told her and her husband that he had settled his claim against the railroad shortly before they left; he watched the two or three-year-old baby of the Gammill's three or four times while the witness went to the store.

Edward H. Davidson, chief of police of Mattoon in 1948 and for more than a year an adjuster for an insurance company at the time of the trial, had known Bowman more than twenty years. In the fall of 1948 Bowman came to the witness' office and told him that his mother and sister were trying to get him declared incompetent so they could get his money; that he had settled with the railroad about three or four weeks prior to the conversation. The witness saw Bowman three or four times after that and they discussed Bowman's money problems; while he was chief of police no reports came to him that Bowman was following people around and sort of staggering about the streets of Mattoon. He noticed no difference in Bowman so far as his mind was concerned following the railroad accident. In his opinion Bowman was competent.

Other witnesses whose contacts with Bowman came through veterans' organizations and services testified to his ability to transact business. Clarence P. Miller, a New York Central trainman, knew Bowman since the latter part of 1948 or early part of 1949 through the American Legion.

They worked together in putting a new kitchen in a large garage which the Legion had bought for a home. He noticed nothing abnormal so far as Bowman's mind was concerned; he did his work well, was able to carry on intelligent conversations, speak coherently, and what he said made sense to the witness. Bowman was initiated into the Forty and Eight Club in October 1951. It is an honorary degree for meritorious work with the Legion. He did not notice any blank, staring or dreamy look in his eyes. In his opinion Bowman was competent to transact business.

William J. McKleroy, service officer for the Illinois Veterans' Commission, knew Bowman for approximately sixteen years. Bowman petitioned the Veterans of Foreign Wars in the latter part of 1948 and joined in January 1949 when the witness was commander. He saw Bowman quite frequently at the Veterans of Foreign Wars and around town for a period of about six months; had conversations with him and did not notice anything unusual or abnormal about him so far as his mind was concerned; he seemed no different to the witness from back sixteen years ago. Bowman filed several claims with the Illinois Veterans' Administration during the preceding four or five years.

Mrs. Ann Dykes first came in contact with Bowman in 1948 or 1949 when he came into a drive-in restaurant she owned. She did not notice anything abnormal about him so far as his conversation or mentality was concerned. She became secretary of the Illinois Veterans' Commission Office from March 29, 1951 to March 15, 1953 and there saw Bowman quite frequently as he made application for different benefits. She filled out applications for him, as she did for all applicants, as the questions are not too simple. She did not notice anything abnormal about him so far as his mind was concerned nor in the way he talked.

He was mentally competent to answer questions that she asked him. He told her that he had made a settlement with the railroad for $15,000 and had $9,000 in bonds.

Joseph P. Smith, Jr., a young lawyer who came to Mattoon in July 1951, met Bowman at the American Legion Home shortly afterwards, and his contacts with Bowman were principally in seeing him at the American Legion. On several occasions he discussed personal matters with Bowman, but did not represent him professionally as Bowman had a conservator. There was nothing abnormal or unusual about the way he talked. He was able to carry on an intelligent conversation and discussed various subjects. The witness believes he was capable of entering into business transactions.

The mental competency of Bowman to execute the release of his claims against defendant on September 18, 1948 is established by the overwhelming weight of the evidence. There is no evidence that defendant believed him to be incompetent to contract. The trial court erred in denying a new trial. We reverse the judgment as against the manifest weight of the evidence and remand the cause for a new trial.

However, as the case must be tried again and as reversible error in other respects was committed by the court, we regretfully extend this opinion so that these matters may be discussed and possible error on a second trial averted.

Defendant contends that the court erroneously permitted the lay witnesses for plaintiff—Mosley, Mrs. Foster, Horn, Hilton and Brady—to state their opinions that Bowman was incompetent. The objection to the testimony of the first four witnesses was properly preserved, and for the reasons hereinbefore stated in discussing the weight of the

opinions stated by these witnesses, the court erred in permitting them to testify. For the same reason the testimony of Brady was objectionable, but defendant failed to make a proper objection.

Defendant argues that the court erroneously permitted Mrs. Foster, Bowman's niece, to testify that "at times he (Bowman) acts more childish than my daughter, who is eight," and that, when showing his new trailer "he was like a child with a new toy," and in permitting Mrs. Sims, Bowman's sister, to state that "he (Bowman) acts like a ten year old child." The characterization of Bowman's conduct and its comparison with that of a child was erroneous. The witnesses should have stated facts and not conclusions so that the jury could properly evaluate the testimony and draw inferences from facts, not conclusions. *Wallace* v. *Whitman*, 201 Ill. 59, 67; *Bohn* v. *Standard Laundry Co.*, 148 Ill. App. 494, 497. The first statement of Mrs. Foster was received without objection. Proper objection was made to the second statement, and a motion to strike the statement of Mrs. Sims preserved the objection to her statement. Similar expressions should be avoided on a second trial.

A more important matter is the objection of the defendant to the testimony of the witness Horn, captain of police, elicited on direct examination and not on cross-examination as contended by plaintiff, that he, the witness, received numerous reports that Bowman was disturbing people on the streets, creating a nuisance to them. Defendant objected to what the reports were and moved to strike the answer. The objection was overruled and the motion denied. The witness then stated that this happened ten or twelve times. On cross-examination he stated that he had no records of these complaints. He believed he had a

report in September 1948, a complaint in January 1949 and in February, and that the rest of the incidents were in 1950 and 1951. He could not recall the names of any of the persons reporting to him or to the department.

The admission of this hearsay evidence—statements of unnamed persons—was plainly erroneous. Plaintiff makes no serious effort to sustain the ruling of the court, merely quoting an inapplicable statement from Morgan, Basic Problems of Evidence (Vol. 1, p. 217, *et seq.*) to the effect that when a trait of a person's character is a provable fact, proof of reputation as to that fact is admissible as tending to prove the truth of the matter reputed. Plaintiff's principal answer is that defendant is in no position to complain because after the ruling of the court it elicited practically the same evidence on cross-examination, citing *Porter* v. *Terminal Railroad Assn.*, 327 Ill. App. 645, and *Wright* v. *Avery*, 172 Ill. 313. Plaintiff's position is not tenable. *Wright* v. *Avery* is not applicable. It involved a motion for a directed verdict at the close of plaintiff's evidence, the court holding that "defendants waived their motion by introducing testimony on their behalf." In *Porter* v. *Terminal Railroad Association* the admission of a statement by plaintiff over objection was alleged to be error. No authorities were cited as to the competency or incompetency of the evidence, and the Appellate court held that it was immaterial. However, the court stated that practically the same evidence was elicited on cross-examination by defendant and that the error, if any, was cured, citing but not quoting 4 C. J. 983. This is not the law in Illinois. In *Teter* v. *Spooner*, 279 Ill. 39, 46-47, the court said:

> "It would, indeed be an extraordinary rule, after these questions had been asked on direct examination, to hold that counsel for the plaintiffs in error could not, on cross-examination, ask questions of a similar

character without waiving objections previously made to the questions on the direct examination. Indeed, this court, after a review of the authorities in other jurisdictions, has held that after the court has overruled defendant's objections to a certain class of evidence the defendant may introduce evidence of the same class to meet that of the plaintiff without waiving his right to claim his exceptions on appeal. (*Chicago City Railway Co.* v. *Uhter*, 212 Ill. 174, and cases there cited.) There can be no question that it was error to permit the asking and answering of these questions and that this error was not waived by any questions or acts of counsel for plaintiffs in error."

See also *City of West Frankfort* v. *Marsh Lodge*, 315 Ill. 32, 35-36.

The court erroneously refused to receive in evidence eleven checks signed by Bowman within a month after the settlement of September 18, 1948, in payment of bills owed by him, personal property purchases, and in transferring his account to the Mattoon National Bank. Williams, vice president of the bank on which the checks were drawn, and in whose presence Bowman had signed the signature card when opening the account, testified that each check bore Bowman's signature. These checks were cashed by the bank. Plaintiff says in her brief that "An examination of the checks will reveal that, other than his signing, they were written in a different hand, or in some instances typed," and adds: "The court properly ruled that his signature card was admissible, but not the check by bare proof of the signature." No authority is cited to support this contention. The checks were a part of defendant's evidence showing the transaction of business by Bowman, and no objection was made to their materiality. Practically all checks are now filled out as to date, name of payee and amount by someone other than the signer, or are typed.

The check gets its validity from the signature, and no further proof is required in the absence of evidence on the face of change, erasure or other mutilation, matters not present here.

One of the most serious errors of the court in ruling on evidence is its rejection of the testimony of Hasch as to his conversations with Bowman during the negotiations with Seibert. This testimony was competent and of vital importance on the question of Bowman's competency and his understanding of the transaction. *Wilkinson* v. *Service*, 249 Ill. 146, 151. It also served as a foundation of Hasch's opinion as to Bowman's competency. *Pederson* v. *Nixon*, 284 Ill. 421, 428-429. Plaintiff, ignoring the reasons assigned by defendant for the admission of this testimony, and the authorities cited, erroneously treats the question as an effort to "inject something of settlement negotiations." This contention is wholly irrelevant. Plaintiff attempts to bar consideration of the question by insisting that defendant failed to preserve the record, since it failed to make an offer of proof. This technical escape is not available in this case. The purport of the question was plain and the answers asked for could only relate to the matters involved in the settlement and Bowman's understanding of them. An offer of proof was not necessary. As said in *Creighton* v. *Elgin*, 387 Ill. 592, 606:

> "The court clearly erred in sustaining the objection. It is immaterial that the ruling was not followed by an offer of proof. It is not necessary that an offer of proof be made where the question shows the purpose and materiality of the evidence. It is not necessary that counsel state what the answer would be. If a question is in proper form and clearly admits of an answer relative to the issues, the party by whom the question is propounded is not bound to state facts proposed to be proved by the answer unless the court requires him to do so. *Hartnett* v. *Boston Store of Chicago*, 265 Ill. 331."

Another serious error of the trial court was in permitting Dr. Otto Berdach to testify over objection to subjective symptoms related to him by Bowman in an examination on September 9, 1951, ten months after this suit was instituted, and to base his diagnosis and answer to a hypothetical question, in part, on such symptoms. At the time of the examination the doctor was chief of the male admission service of the Jacksonville State Hospital. He testified that "We were just about to get around to see him (Bowman) when he was ready to leave. * * * I don't recall whether or not I gave him any treatment." It appears from the testimony of Dr. N. S. Zeitlin, a medical expert witness who testified for plaintiff and who preceded Dr. Berdach on the stand, that two days later, September 11, 1951, Bowman appeared in his, Zeitlin's, office in Chicago where the doctor took X-rays of Bowman at the instance of plaintiff's counsel, which were used in the doctor's testimony as an expert.

The rule permitting a physician to testify to subjective symptoms is limited to a treating physician, for the reason stated in *Shell Oil Co.* v. *Industrial Comm.*, 2 Ill. 2d 590, 602, where the court said:

> "'It is an exception to the hearsay rule, however, that declarations of an injured person to his treating physician as to his physical condition, and the cause thereof are admitted in evidence for the reason that it is presumed that a person will not falsify such statements to a physician from whom he expects and hopes to receive medical aid. (*Shaughnessy* v. *Holt*, 236 Ill. 485)."

See *Told* v. *Madison Bldg. Co.*, 216 Ill. App. 29, 49-50.

While plaintiff does not contend that Dr. Berdach treated Bowman, she insists that "It is obvious the doctor did not examine Bowman for the purpose of testifying." The good

faith or intent of the doctor is not involved. It is the demonstrated lack of good faith on Bowman's part and his intention not to remain for treatment that renders the testimony inadmissible. By this testimony Bowman was able to get before the jury his self-serving statements in furtherance of his pending suit, such as his denial that he had been married and his belief that some one substituted for him in the ceremony. Its admission is reversible error.

Edward H. Davidson, called by defendant as a nonexpert witness as to Bowman's mental competency, testified on direct examination that in the fall of 1948 Bowman told him that his, Bowman's, mother and sister were then trying to get him declared incompetent so they could get his money. On cross-examination plaintiff elicited the statement that the witness had told Kenneth Green, one of the plaintiff's attorneys, of Bowman's complaint. Green, called in rebuttal, denied Davidson's testimony on cross-examination. In cross-examining Davidson as to whether he had told anyone of Bowman's complaint plaintiff was cross-examining on a collateral matter and Davidson's answer was conclusive against her. It was not subject to impeachment. 1 Greenleaf on Evidence (15th ed.) sec. 449; *Giffard-Wood Co.* v. *Western Fuel Co.*, 209 Ill. App. 357, 365; *Girdzus* v. *Van Etten*, 211 Ill. App. 524, 529. The motion to strike Green's testimony should have been allowed.

Defendant also complains of the cross-examination of its witness Hasch and the attempted impeachment of the witness by plaintiff in rebuttal as to his participation in plaintiff's appointment as conservator of Bowman in October 1949. We have carefully examined the testimony of

Hasch and the rebuttal testimony of plaintiff. There is much in the cross-examination of Hasch that is objectionable. However, defendant failed to object and cannot now complain. As we do not believe that the errors will be repeated on a new trial we will not, because of the excessive length of this opinion, refer in detail to the objectionable matters. Error, if any, in the attempted impeachment of Hasch by plaintiff will undoubtedly not be repeated on a second trial if the rule hereinbefore applied to the attempted impeachment of the witness Davidson is followed.

The court erred in requiring Seibert to testify over objection to the usual and customary fee in a contingent case like the present. *Hall* v. *C. & N. W. Ry. Co.*, 5 Ill. 2d 135. However, similar testimony was elicited on the cross-examination of Hasch, without objection, and the error in Seibert's examination is negligible. Much of the examination of the witnesses Joseph H. Wright, vice president and general counsel of defendant, and William M. Holwick, general claim agent of defendant, called as witnesses by plaintiff, was objectionable. But again, objection to such examination was not made. The examination in open court as to the records produced on subpoena and the implication of failure to produce all papers called for, was improper. Compliance with the subpoena was a matter only for the court, and whatever complaints in this respect plaintiff had should have been investigated by the court out of the presence of the jury.

We deem it unnecessary to consider the alleged errors in plaintiff's argument to the jury and in the court's action in refusing the instructions complained of, as these errors, if any, can be avoided on a second trial. We do not consider the question of the excessiveness of the damages awarded for a like reason.

Whether the issues in the main case and the issues raised by the special defense should be tried together, is a matter resting in the sound legal discretion of the trial court. However, the record proves the improbability, if not the impossibility, of a fair trial for defendant on the issues of the special defense so long as those issues are tried with the issues of the main case. All evidence pertinent to the mental condition of Bowman on September 18, 1948 is material in the main case as an element of damages. Only that evidence relating to his mental condition after that date which tends to establish his mental condition on September 18, 1948 is competent on the issues of the special defense. The answer of the jury to the special interrogatory, and the general verdict against the overwhelming preponderance of the evidence as to Bowman's mental condition on September 18, 1948, show the prejudicial effect of the evidence as to the later condition of Bowman's mind, which is not competent on the issues of the special defense. We therefore suggest that the issues of the special defense and of the main case be tried separately.

Because the verdict and the answer to the special interrogatory are against the manifest weight of the evidence, and because of the errors of the court in rulings on evidence, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

FRIEND, P.J., and BURKE, J., concur.

APPENDIX D

A Memorandum of Trial Court

Filed January 17, 1955. R. 3, pp. 457-460.

"I believe we are here, gentlemen, on a motion for judgment *non obstante veredicto*, or, in the alternative, a new trial in the matter of Elizabeth Bowman, as Conservator *vs.* Illinois Central Railroad Company, No. 50-C-1008?.

* * *

"Although the defendant in its answer denied neglect, it does not now contest either one of neglect on its part or neglect on the part of the plaintiff's ward; that the defendant was responsible to Bowman for the serious injuries sustained through its neglect is apparent.

"The more important question is whether the defendant obtained a valid release. The jury was asked this question:

> 'Do your find by a preponderance of the evidence that at the time plaintiff's ward executed the release he was incapable of understanding what he was doing and unable to comprehend the terms and effect of the release?'.

"They found against the defendant.

"With reference to the question of the manifest weight of the evidence let me, as the Trial Court, say that the verdict from the evidence and record is justified.

* * *

"It is urged that the verdict is excessive. All this Court has as a basis to determine this question is in the record. This was the basis of the jury's verdict. From the record and from a consideration of the briefs this Court cannot say the verdict is excessive.

"Therefore, the motions of the defendant in all event are overruled and denied."

APPENDIX E

United States Constitution, Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Illinois Constitution, Article VI

"§11. After the year of our Lord 1874, inferior appellate courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the general assembly may provide may be prosecuted from circuit and other courts, and from which appeals and writs of error shall lie to the supreme court, in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law . . . "

State courts, Certiorari, 28 U.S.C. §1257 (3).

"Final judgments or decrees rendered by the highest court of a state * * * may be reviewed by the Supreme Court as follows: * * *

"By writ of certiorari, where the validity of a * * * statute of the United States is drawn in question * * * on the ground of its being repugnant to the Constitution * * * of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or statutes of * * * the United States."

Federal Employers' Liability Act, 45 U.S.C. §56.

" . . . The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

Illinois Appellate Court Act.

Ill. Stat. 1955, Chap. 37, pp. 1299 *et seq.*

"§1. There are created four appellate courts in this state, to be called the appellate courts in and for the districts created: The first district shall consist of the County of Cook . . ."

* * *

"§8. The said appellate courts created by this Act shall exercise appellate jurisdiction only, and have jurisdiction of all matters of appeal or writs of error from the final judgments, orders or decrees of any of the circuit courts . . . in any suit or proceeding at law, . . .

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts, to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: . . . (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court: . . .

* * *

"§9. The said appellate courts shall be vested with all power and authority necessary to carry into complete execution all their judgments, decrees and determinations in all matters within their jurisdiction, according to the rules and principles of the common law and of the law of this state."

Illinois Civil Practice Act.

Ill. Stat. 1955, Chap. 110, pp. 562 *et seq.*

"§75. . . (2) . . . (e) In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final judgment or decree entered in the cause in the trial court reverses said judgment or decree and remands the cause for a new trial or hearing, and in which the party in whose favor the trial court's judgment or decree was rendered shall present to and file with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances then were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that Court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing. Thereupon it shall be competent for the Supreme Court to grant leave to appeal from said final judgment of reversal for its review and determination with the same power and authority in the case, and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section." . . . .

* * *

"§92. Powers of Reviewing Court. (1) In all appeals the reviewing court may, in its discretion, and on such terms as it deems just: . . . (d) Draw inferences of fact; (e) Give any judgment and make any order which ought to have been given or made, and make any other and further

orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution, that the case may require . . .

"(3) (a) Any error of law affecting the judgment, decree or order appealed from may be brought up for review in any civil case.

"(b) Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall re-examine cases brought to it by appeal from the Appellate Courts; as to questions of law only."

Supreme Court Rule 38.

Ill. Stat. 1955, Chap. 110, p. 537

"The party prosecuting an appeal in this court or an Appellate Court shall furnish an abstract of the record on appeal, referring to the pages of the record by numerals on the margin. If the record contains the evidence it shall be condensed in narrative form so as to present clearly and concisely its substance . . . In cases brought from an Appellate Court the abstract filed in that court may be filed in this court by changing the cover and including an abstract of the record of the Appellate Court with an index thereto. The abstract need only be sufficient to present fully every error relied upon. Matters in the record on appeal not necessary for a full understanding of the questions presented for decision shall not be abstracted . . . The abstract will be taken to be accurate and sufficient unless the opposing party files an additional abstract making necessary corrections or additions . . . "

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SEP 23 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 366

ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

ELIZABETH B. BOWMAN, as Conservator of the Person and Estate of Charles Dale Bowman,

Respondent.

Petitioner's Reply

FLOYD E. THOMPSON
CHARLES J. O'LAUGHLIN
THOMAS P. SULLIVAN
11 South LaSalle Street
Chicago 3, Illinois
JOSEPH H. WRIGHT
HERBERT J. DEANY
ROBERT S. KIRBY
135 East 11th Place
Chicago 5, Illinois
Attorneys for Petitioner.

LAW REVIEW 6881

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Respondent's answer to the petition for certiorari is grounded on the proposition that FELA cases must be adjudicated uniformly throughout the country, whatever the forum chosen by the plaintiff. Uniformity may be a desired end, but uniformity of adjudication in State courts of causes derived from Federal statutes is always subject to the jurisdictional limitations of the courts of the particular State in which plaintiff chooses to bring his action. In Section 6 of the FELA, Congress *expressly* recognized the existing jurisdiction of State courts to entertain FELA cases within the orbit of their State conferred authority.

Of necessity, a FELA case litigated in a State court is to be adjudicated within the full perimeter of the court's powers. *Herb v. Pitcairn*, 324 U.S. 117, 120, 123; *Missouri v. Mayfield*, 340 U.S. 1, 4-5. No Federal statute can expand or contract the jurisdiction or powers of State courts (Petition, pp. 23-26), and to that extent Congress has chosen to accept State courts as they are when their jurisdiction is invoked in FELA cases. *Douglas v. N.Y., N. H. and H. R. Co.*, 279 U.S. 377, 387-8; *Second Employers' Liability Cases*, 223 U.S. 1, 56-59; *St. L., I. M. & S. Ry. Co. v. Taylor*, 210 U.S. 281, 285. These decisions rest on fundamental principles of distribution of powers between the Federal government and the several States.

Nor are the powers of *State* courts impaired when hearing FELA cases merely because the Federal Constitution or Judicial Code has placed limits on the *Federal* courts. *M. & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 220-222; *Second Employers' Liability Cases*, 223 U.S. 1, 56. Illinois Appellate courts are not transformed into Federal courts of appeal when hearing FELA cases. Hence, even if Federal courts of appeal were precluded by Federal law from reviewing the facts and remanding for a new trial where the verdict is contrary to the weight of the evidence or is excessive, State appellate courts would still have the power and duty to do so in reviewing *all* cases, in accordance with established common law practice. *St. L., I.M. & S. R. Co. v. Craft*, 237 U.S. 648; 661; *Union Pacific R. Co. v. Hadley*, 246 U.S. 330, 334. These two appellate functions are a basic part of the jurisdiction of all State reviewing courts. In fact, the 1948 amendments to the Judicial Code released Federal courts of appeal from the procedural restrictions which previously precluded

them from exercising these powers, and courts of appeal may now make use of them in proper cases. See *Bucher* v. *Krause*, 200 F. 2d 576, 586-587, cert. denied 345 U.S. 997.

Accordingly, Respondent's persistent use of the shibboleth of "uniformity" in FELA practice begs the question presented. The FELA does not purport to revise the powers or jurisdiction of State courts. (Petition, pp. 11-12.) It is not a mere local rule of practice which the Illinois Supreme Court, by bare majority, has scuttled here, but rather a function of Illinois Appellate courts which is grounded in both common law and statute, and which had been exercised by State reviewing courts for many, many years before the FELA was enacted.

Therefore, the truth is that the decision of the Court below in this case is the first break from uniformity on the question presented. All other State courts which have considered this question have reached a conclusion opposite to that reached by the Illinois court in the instant case. (Petition, pp. 17-21.) The situation in Illinois is confusion doubly confounded; this is strikingly illustrated by its opinion in *Petty* v. *Illinois Central R. Co.*, appended hereto.

The issue presented by this case deserves express resolution by this Court. *Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940, has produced confusion and conflicts which will continue until this Court resolves once and for all the important and recurring problems of State court appellate jurisdiction in reviewing FELA cases.

The issue which this case presents affects the appellate remedial process in every State, calling for full analysis and express resolution by this Court. This case meets the tests laid down by this Court for granting review by certiorari, and review should be granted here.

Respectfully submitted,

FLOYD E. THOMPSON
JOSEPH H. WRIGHT
HERBERT J. DEANY
CHARLES J. O'LAUGHLIN
THOMAS P. SULLIVAN
ROBERT S. KIRBY
Attorneys for Petitioner

APPENDIX

Charles Petty, Appellant, v. *Illinois Central Railroad Company, Appellee.*

Opinion filed May 23, 1957.

Rehearing denied September 16, 1957.

Mr. JUSTICE DAILY delivered the opinion of the court:

The circuit court of Cook County entered judgment on a jury verdict awarding damages to plaintiff, Charles Petty, in the amount of $75,000 for personal injuries sustained in a collision between the automobile in which he was riding and defendant's train, and the Appellate Court reversed and remanded the cause for a new trial on the ground that the verdict was manifestly against the weight of the evidence. Plaintiff's motion to strike the remanding order, supported by affidavits, stating that he could adduce no further evidence and waiving his right to a new trial, in accordance with section 75(2)(c) of the Civil Practice Act, was allowed by the Appellate Court, and we have granted plaintiff's petition for leave to appeal.

Before the merits and facts of this cause may be considered, it is incumbent upon this court to determine whether our appellate jurisdiction has been properly invoked. In this connection, we must ascertain the effect of section 75(2)(c) of the Civil Practice Act on our power to review judgments of the Appellate Court. It was to clarify this issue that the petition for leave to appeal was allowed.

Plaintiff contends that section 75(2)(c) of the Civil Practice Act (Ill. Rev. Stat. 1951, chap. 110, par. 199,) as construed in *Olson* v. *Chicago Transit Authority,* 1 Ill. 2d 83, sanctions review in this court of all Appellate Court

cases in which the losing party, whose judgment in the trial court was reversed and remanded by the Appellate Court, finalizes the judgment by filing the requisite motion and affidavit.

Section 75(2)(c) provides: "In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final judgment or decree entered in the cause in the trial court reverses said judgment or decree and remands the cause for a new trial or hearing, and in which the party in whose favor the trial court's judgment or decree was rendered shall present to and file with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances than were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for a new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing. Thereupon it shall be competent for the Supreme Court to grant leave to appeal from said final judgment of reversal for its review and determination with the same power and authority in the case, and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section."

It is apparent that this section gives the party whose judgment in the trial court has been reversed and remanded by the Appellate Court the right to finalize the judgment by filing a motion and affidavit requesting that the remanding portion of the judgment be deleted, and stating that he would be unable on a future trial to adduce other evidence,

and that he waives his right to a new trial. The question is whether the section goes further and nullifies the provision of section 92(3)(b) of the Civil Practice Act (Ill. Rev. Stat. 1955, chap. 110, par. 92(3)(b),) which prohibits this court from examining the question of whether the judgment was "against the manifest weight of the evidence" in cases that are brought to this court by appeal from the Appellate Court.

The primary inquiry in *Olson* v. *Chicago Transit Authority*, 1 Ill. 2d 83, was the constitutionality of section 92(3)(b) of the Civil Practice Act, which was attacked on diverse grounds. Plaintiffs therein argued that under the terms of section 92(3)(b), as construed by the court, a plaintiff whose judgment had been reversed and remanded would be obliged to submit to a series of trials, and that each subsequent new trial could result in a verdict and judgment in plaintiff's favor, followed by a reversal and remandment in the Appellate Court, so that review in the Supreme Court could never be had. In reply thereto the court in the *Olson* case made the following statement, upon which plaintiff herein relies: "Section 75(2)(c) provides a ready remedy, however, by making it possible to eliminate remandment where the plaintiff is satisfied that he has produced all the available evidence." Upon the basis of this statement plaintiff contends that the series of retrials could be obviated, and review had in the Supreme Court, in all such cases where the Appellate Court reversed and remanded a trial court judgment in favor of plaintiff, by the ready remedy of finalizing judgments provided by section 75(2)(c). The sentence that immediately followed in the *Olson* opinion, however, was intended to dispel that inference: "Moreover, since the scope of our review in any event excludes consideration of the weight of the evidence under section 92(3)(b) of the Civil Practice

Act, (Ill. Rev. Stat. 1954, chap. 110, par. 216(3)(b),) the non-reviewability of the judgment of the Appellate Court works no hardship in this case."

In reconciling the two statutory provisions it is evident that under the terms of section 75(2)(c), this court can review judgments finalized under this section only on the same basis and subject to the same rules as other final judgments of the Appellate Courts. Such review is restricted to questions of law by section 92(3)(b) of the Civil Practice Act, which provides that except as to equitable issues, the Supreme Court shall re-examine cases brought to it by appeal from the Appellate Court as to questions of law only. Consequently, it must be concluded that unless the cause presents a question of law, this court is without power to review an Appellate Court judgment reversing and remanding a cause, even if the remanding portion of the order was stricken under section 75(2)(c). This interpretation, moreover, is in accord with the case law. (*Shaw* v. *Courtney*, 385 Ill. 559; *Mabee* v. *Sutliff & Case Co.*, 404 Ill. 27.) This is the thought that we intended to express in the *Olson* case. We recognize, however, that the language there used with reference to section 75(2)(c) might have created ambiguity and misled plaintiff into moving to strike the remanding order.

Therefore, pursuant to our authority under section 92(1)(c) of the Civil Practice Act authorizing us to enter any order which ought to have been given or made, or as the case may require, the cause is remanded to the Appellate Court, with directions that the remanding order be reinstated. This conclusion is not intended to, and does not, express approval of the determination of the Appellate Court on the issue of the manifest weight of the evidence.

Remanded, with directions.

SUPREME COURT, U.S.
SEP 7 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 366

ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

ELIZABETH B. BOWMAN, as Conservator of the person and estate of CHARLES DALE BOWMAN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

JAMES A. DOOLEY,
111 W. Washington Street,
Chicago 2, Illinois.
STate 2-1453
Attorney for Respondent.

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IN THE

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OCTOBER TERM, A. D. 1957.

No. 366

ILLINOIS CENTRAL RAILROAD COMPANY,

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vs.

ELIZABETH B. BOWMAN, as Conservator of the person and estate of CHARLES DALE BOWMAN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTION PRESENTED.

The sole question presented here is whether a state Appellate Court in an action under the Federal Employers Liability Act may reweigh the evidence on which a jury

reached its verdict and set aside that verdict as being contrary to the manifest weight of the evidence. This Court has already decided this issue adversely to petitioner on several occasions. (See *Rogers* v. *Mo. Pac. Ry.*, 352 U.S. 500; *Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940; *Lavender* v. *Kurn*, 327 U.S. 645).

There is nothing novel in this appeal.

STATEMENT OF THE CASE.

The Accident and Settlement.

The Respondent's ward sustained (among other injuries) multiple depressed skull fractures which ultimately caused him to be adjudicated a mental incompetent, and a conservator was appointed for him. While still suffering from the effects of the accident, but before his conservator was appointed, he executed a release in consideration of payment of $15,000.00.

The Proceedings In The Trial Court.

On trial of the case the Petitioner did not seriously contest its liability. The issues were, whether the release was valid, and the amount of the damages. The jury not only returned general verdicts in favor of Respondent's ward, but specifically found that at the time the ward executed the release, he was incapable of understanding what he was doing and unable to comprehend the terms and effect of the release.

The trial court in a post-trial memorandum held these verdicts not against the manifest weight of the evidence, and entered judgment on them.

The Proceedings In The Illinois Appellate Court.

The Appellate Court found the verdicts against the manifest weight of the evidence, and also held that various evidentiary errors had intervened. It reversed the judgment and remanded the case for a new trial.

Pursuant to the Illinois statute, Respondent filed an affidavit setting forth that on another trial she could not adduce further or different evidence, and moved that the court strike the remanding order from its judgment, so that she could appeal to the Illinois Supreme Court. This the Appellate Court refused to do.

The Proceedings In The Illinois Supreme Court.

Respondent thereupon filed a petition for leave to appeal in the Illinois Supreme Court, which assumed jurisdiction, found the refusal of the Appellate Court to strike the remanding order "arbitrary and contumacious," and proceeded to review the case. The Supreme Court found that there was ample evidence to sustain the jury's verdict, both on the question of release and on the question of damages, that the power of the Appellate Court to review the evidence supporting the verdicts was exhausted once their factual basis was apparent, and found further that no evidentiary errors intervened. It thereupon reversed the Appellate Court and affirmed the judgment of the trial court. The substance of the opinion of the Illinois Supreme Court was that the scope of review of the Appellate Court was limited to determining whether there was an evidentiary basis for the verdicts of the jury.

It is worthy of note that the dissenting justices in the Illinois Supreme Court filed an opinion which was later displaced by a second opinion. The second opinion appears at page 33-A of the Appendices filed by Petitioner. We have included the first opinion as an appendix to this Reply.

The dissenting judges in their first opinion, filed March 11, 1957, did not agree with the majority because they believed that the Supreme Court did not have the power to require the Appellate Court to strike the remanding order from its mandate—a matter of state procedure, not material here. In that opinion two of the three stated that the Appellate Court erred in its appraisal of the evidence. Thus, their dissent was bottomed on Illinois procedural rules. It was not until May 20, 1957, that they took the position that the method of review on the supervision of jury verdicts in state courts was a matter for local determination.

Petitioner states (page 7) that the opinion of the Illinois Supreme Court was founded primarily on the *Harsh* and *Dice* cases (*Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940; *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359).

Petitioner fails to advise the court that an additional per curiam opinion was filed on rehearing with the *Rogers* and *Webb* cases (*Rogers* v. *Missouri Pac. R. Co.*, 352 U. S.; *Webb* v. *Ill. Cent. R. Co.*, 352 U.S. 512), considered at length together with many other decisions of this Court.

The conclusions reached by the Illinois Supreme Court were founded on a careful and conscientious review of all the cases decided by this Court which throw any light on the situation.

SUMMARY OF THE ARGUMENT

The only issue is whether a court of review can weigh the evidence in an action under the FELA and nullify the verdict of a jury when there is an evidentiary basis for that finding. The rules concerning the limited power of reviewing courts in this type of action have been articulated by this court on numerous occasions. One of those cases (*Harsh* v. *Ill. Term.*, 348 U.S. 940) was an appeal from an Illinois court. Because of these decisions, and particularly in view of a series of cases decided by this Court on February 25, 1957, (*Rogers* v. *Missouri Pac. R. Co.*, 352 U.S. 500; *Webb* v. *Ill. Central R. Co.*, 352 U.S. 512; *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370, and *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521), there is no doubt as to the proper method of treating an appeal in an action of this character. Accordingly, there exists no reason whatsoever for granting certiorari here.

Petitioner's contention concerning an Illinois statute whereby the evidence can be reviewed by an Appellate Court is an argument for a local rule of procedure, which is contrary, not only to the common law, as interpreted by this Court, but also to the uniform method of review enunciated by this Court for all FELA actions. Unless that uniformity is maintained, the rights conferred by the Act will be meaningless, since a court of review, in weighing the evidence, could emasculate the right of trial by jury. If such were permissible, the question would not be whether there was evidence to sustain the jury verdict, but whether the reviewing court agreed with the conclusion of the jury.

The question of damages was reviewed in this case at length by the Illinois Supreme Court. Evidentiary basis was found for both general and special verdicts. Damages are not reviewed in any manner different from other factual matters.

I.

To allow Illinois Appellate Courts to reverse and remand cases brought under the Federal Employers' Liability Act on the theory that the verdict is contrary to the manifest weight of the evidence is to deny to F.E.L.A. cases in Illinois Courts that uniformity which congress intended and without which its purposes cannot be effectuated.

It should be clear beyond peradventure that Congress and this Court are committed to the principle that the F.E.L.A. must be uniformly administered in matters of substance.

Many reasons have actuated this Court to require uniformity in the administration of the F.E.L.A. Amongst them are "The special features of this statutory negligence action that make it significantly different from the ordinary common law negligence action." (*Rogers* v. *Mo. Pac. R. Co.*, 352 U.S. 500, 509, 510.)

Again, the action itself, created as it is by statute, is unique in that contributory negligence, or assumption of risk play no part, and the negligence justifying recovery is singular to it. Then, too, the beneficiaries belong to a special group.

Perhaps the most cogent of all the reasons for uniformity is the fact that the right itself could be defeated if it were to be subjected to various local rules. Of that

danger, this Court has been well aware, and has repeatedly declared that state laws cannot control the incidents of this Federal right.

Attempted state laws, or rules of local procedure have manifested themselves in many forms. On each occasion they have been stricken down.

In the *Dice* case (*Dice* v. *Akron C. & Y. R. Co.*, 342 U.S. 359), the Ohio law provided that whether a release alleged to be fraudulently obtained would be set aside was a matter for a court and not a jury. This Court held that state law did not control, and had this to say:

> "Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." (p. 362).

Further demonstration of how uniformity affects all incidents to the Federal right is *Brown* v. *Western Railway of Alabama*, 338 U.S. 294. Here a plaintiff failed to plead his case properly in accordance with the rules of pleading in Georgia, and a demurrer to his complaint was sustained. He stood on his complaint, and the suit was dismissed. One would naturally suppose that if any part of a lawsuit were to be considered procedural it would be the pleadings, and that a decision thereon would be completely within the competence of the state courts. However, this Court observed that "this federal right cannot be defeated by the forms of local practice," (p. 296) and went on to say, pp. 298, 299:

> "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' *Davis* v. *Wechsler*, 263 U. S. 22."

In the *Garrett* case (*Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239), the Pennsylvania state rule on the burden of proof in releases differed from the Federal rule. The state trial court set aside plaintiff's verdict on the ground that he did not sustain the burden of proof required under Pennsylvania law to invalidate a release. The state Supreme Court affirmed the judgment on the ground that the rule as to burden of proof on releases did not affect the substantive rights of the parties, but was merely procedural, and, therefore, controlled by state law. This Court held this was no mere procedural matter, saying:

> "The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure. *Central Vermont Ry. Co.* v. *White*, 238 U.S. 507, 511, 512; *Cities Service Co.* v. *Dunlap*, 308 U.S. 208, 212."

It is noteworthy that the Pennsylvania court in the Garrett Case said the plaintiff did not adduce sufficient proof. But this is exactly what the Appellate Court of Illinois said in this case. What distinction can be made between the two cases?

It is thus apparent that everything incidental to this Federal right, whether it be trial by court or jury, the sufficiency of a complaint, the burden of proof and sufficiency of evidence, or any other matter touching in any wise the right is to be treated according to uniform rules.

In view of these cases flatly holding that state law cannot control an incident to this Federal right, there is no meaning to Petitioner's argument that the power of state courts have been impinged upon. Obviously if, as here, they were to re-try the facts, railroad workers in Illinois courts would be deprived "of a goodly portion" of the relief intended for them.

Although the scope of review in F. E. L. A. actions has been determined in many cases, Petitioner seeks the issuance of the writ on the ground that there is a conflict between the opinion below and that of other state courts. It would suffice to say that such is not a reason when the opinion below is in accord with the decisions of this Court. (Rule 19-A of this Court).

Morevover, we have footnoted only some of the numerous state courts who refuse to weigh the evidence. Indeed, even the cases cited by Petitioner are not the law today in their particular jurisdictions.(1)

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(1)

Arizona—Lindberg v. *Bolon*, 67 Ariz. 259, 194 P. 2d 454.

California—Pfingsten v. *Westhaver*, et al., 39 Cal. 2d 12, 244 P. 2d 395.

Connecticut—Harris v. *Clinton*, 142 Conn. 204, 112 Atl. 2d 885.

Indiana—Hinds v. *McNair*, 129 N.E. 2d 553.

II.

The right to determination of all factual questions by the jury, not by a court of review, is a substantive right, not a procedural matter. To allow judges of a court of review to interfere with the conclusion of the jury because they themselves might have decided the issue otherwise or because they do not agree with the verdict is to vitiate the right to trial by jury:

Uniformity of administration means, as this court has often articulated, that the arena of court and jury be well defined. The right to trial by jury has been called "a basic and fundamental feature of our system of Federal jurisprudence." (*Jacob* v. *New York City*, 315 U. S. 752).

That same right has been described on repeated occasions as part and parcel of the remedy afforded railroad workers, under the Employers Liability Act, and

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Kansas—*Smith* v. *Wichita Transport Co.*, 179 Kan. 8, 293 P. 2d 242.

Kentucky—*Boland* v. *Murray*, 239 S.W. 2d 967.

Missouri—*Wilcox* v. *Coons*, 362 Mo. 381, 241 S.W. 2d 907.

Nebraska—*Wallace* v. *Ins. Co. of North America*, 162 Neb. 172, 75 N.W. 2d 549.

Ohio—*Hoffman* v. *Wagner*, 149 Ohio 50, 77 N.E. 2d 467.

Oklahoma—*Rain* v. *Balph*, 293 P. 2d 359.

Pennsylvania—*Londrino* v. *Equitable Life Assur. Soc.*, 377 Pa. 543, 105 Atl. 2d 333.

South Carolina—*Kilpatrick* v. *B. of Rt.*, 210 S.C. 379, 42 S.E. 2d 891.

Tennessee—*Hime* v. *Sullivan*, 188 Tenn. 605, 221 S.W. 2d 893.

Texas—*In re King's Estate*, 150 Tex. 662, 244 S.W. 2d 660.

Washington—*Johnson* v. *Dept. of Labor & Industries*, 46 Wash. 2d 463, 281 P. 2d 994.

to deprive them of the benefit of a jury trial, where there is evidence to support the verdict, means taking away a "goodly portion of the relief which Congress has afforded." (*Bailey* v. *Central Vermont Co.*, 319, U. S. 353, 354); *Dice* v. *Akron C. & Y. R. Co.*, 342 U. S. 359, 363).

And what is the jury's function in F. E. L. A. actions?

On many occasions this Court has defined it in detail. In *Rogers* v. *Mo. Pac. R. Co.*, 352 U. S. 500, wherein the Court granted certiorari to determine whether the Missouri Supreme Court invaded the jury's function, it was said at page 504:

> "But, as the probative facts also supported with reason the verdict favorable to the petitioner, the decision was *exclusively* for the jury to make." (Emphasis ours).

Can there be any clearer statement?

Petitioner has quoted a California intermediate court case decided in 1939 (*King* v. *Schumacher*, 32 Cal. App. 2d 172, 89 P. 2d 466). But in 1952, the California Supreme Court in *Pfingsten* v. *Westhaver*, 39 Cal. 2d 12, 244 P. 2d 395, said:

> "If there is any evidence which sustains the implied finding of the jury, its determination is final * * * 'When different conclusions may reasonably be drawn from the evidence by different minds the trial court's findings are not to be disturbed on appeal.'" (p. 13 Cal. Report)

So also has Petitioner referred the Court to an Oklahoma case (*St. Louis-San F. Ry. Co.* v. *King*, 278 P. 2d 845). But in 1956, the Supreme Court of that jurisdiction, in *Rain* v. *Ralph*, 293 P. 2d 359, reaffirmed the doctrine of *Lowe* v. *Hickey*, 176 Okla. 426, 55 P. 2d 769, to the effect that the conclusions of the jury will not be disturbed if they have a foundation in the evidence.

A footnote to this statement reads thus:

> "The very essence of (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35.

Again in the *Rogers* case, (*Rogers* v. *Mo. Pac. R.*, 352 U. S. 500), the limitations of the Court of review were thus described:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make the appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." p. 506, 507.

Indeed, the recent decisions of this Court merely reinforce what this Court has been saying for years in its definition of the function of court and jury in F. E. L. A. actions.

In *Lavender* v. *Kurn*, 327 U. S. 645, (decided in 1943) the Court unequivocally stated that litigants were not free to re-litigate factual issues in a reviewing court, since it would be an undue invasion of the jury's historic function for a reviewing court to weigh the evidence, judge the credibility of the witnesses, and arrive at a conclusion opposite from that reached by a jury. There was cited *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54 (1943); *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350 (1943); and *Tennant* v. *Peoria V. P. U. R. Co.*, 321 U. S. 29 (1943).

But it is urged here that Lavender, Rogers, and the other cases referred to are not determinative of this question, since in those cases verdicts were directed for defendants, while in the instant case the court of review

remanded for a new trial. However, this precise question arose in this Court in *Harsh* v. *Illinois Terminal R. Co.*, 348 U. S. 940. That case also went up from Illinois. There the Illinois Appellate Court reversed and remanded for another trial on the ground that the verdict was contrary to the manifest weight of the evidence. There, as here, the plaintiff moved the court to strike the remanding order and the court in that case granted the application.

There the Illinois Supreme Court refused to interfere with the judgment of the Appellate Court and the plaintiff then petitioned this Court.

In that case Harsh contended in this Court as follows:

1. Federal holdings are controlling in state courts;
2. The state court was without authority to weigh the evidence and hold the verdict to be against the manifest weight of the evidence.

The railroad took the same position Respondent takes here, namely, that by virtue of an Illinois statute, the state Appellate Court could weigh the evidence, and in so doing, was only acting on a matter of procedure.

This Court granted certiorari, heard the matter on oral argument, and succinctly disposed of it thus:

> "Judgment Reversed. (*Lavender* v. *Kurn*, 327 U. S. 645." (*Harsh* v. *Ill. Term. R. Co.*, 348 U. S. 940).

What, then, did this Court decide in the *Harsh* case? It merely reaffirmed the principle of uniformity of the function of court and jury stated in the *Lavender* case, and that the Illinois Appellate Court had no right to weigh the evidence when there was an evidentiary basis for the verdict.

Thus the question of the right of an Illinois Appellate Court to weigh the evidence in F. E. L. A. cases has been definitely decided adversely to petitioner's contention.

Next, it is urged, however, that the Respondent was not denied a jury trial, since the order of the court of review was that the case be remanded for another trial, before another jury. It is argued, further, that the only reason Respondent is now denied another trial is because the remanding order was stricken, at her insistence.

This reasoning is fallacious. The Appellate Court pronounced Respondent's evidence inadequate, and took away her verdict. That decision, if not appealed from, became the law of the case. We have seen that Respondent filed an affidavit that she could produce no other or further evidence.

Therefore, if she went back to the trial court and retried her case, and was fortunate enough to again obtain a verdict, the trial court would be forced to set it aside. This process might continue indefinitely, or until a jury returned a verdict for the Petitioner. In short, the Illinois Appellate Court held that Respondent could never retain a jury's verdict, although it could not gainsay there was an evidentiary basis for a verdict in her favor. By awarding her a new trial through the implement of finding the verdict contrary to the weight of the evidence, they were presenting her with the shadow of a trial, and denying her the substance, for there could never be a recovery since the state Appellate Court opinion, unless reversed, would forever remain the law of the case.

Indeed, the Illinois Supreme Court recognized how the opinion of the Illinois Appellate Court in effect forever deprived plaintiff's ward of his remedy (Petitioner's App. p. 16-A).

We think the error which the Illinois Appellate Court fell into in this case will become apparent if we consider

this Court's pronouncement in the case of *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 479:

> "Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states."

Let us suppose that this case had gone to trial in the federal court in Illinois, or in the state court in New York. With the same evidence, a verdict in favor of plaintiff would have ripened into a judgment. Here its only consequence, if the Appellate Court ruling be affirmed, is a series of retrials ad infinitum. Is this the "uniform federal rule" discussed in the *Brady* case?

III.

In an action under the Federal Employers' Liability Act a federal right is involved and the scope of review presents a federal question.

Although as we shall hereinafter point out, this Court has on numerous occasions articulated the scope open to review in an F. E. L. A. action, the Petitioner contends that the Illinois Appellate Court should be permitted a certain special, supervisory power over jury verdicts in these actions and be authorized to nullify a verdict if it disagrees with it, notwithstanding the verdict may have a basis in the evidence.

This argument overlooks the fact that this action involving, as it does, a Federal right, presents a Federal question. While it may be true that under the *Corcoran* Case (*Corcoran* v. *City of Chicago*, 373 Ill. 567), an Illinois Appellate Court may weigh the evidence in common law actions, such is immaterial here. We are dealing with that which goes to the essence of this federal right, namely, whether the trial is by jury or court.

Although the Illinois Supreme Court attempted to justify its position on common law principles in the *Corcoran* Case, it was in fact based upon the unique provisions of the Illinois statute. And as we, hereinafter, shall point out, this court has construed the common law review to be a review upon questions of law only.

Indeed, in seeking to ingraft upon an F. E. L. A. action this Illinois statute, Petitioner is making an argument for another "local rule of procedure," and one which goes to the heart of the action. If Illinois courts were by virtue of this local statute empowered to weigh the evidence in F. E. L. A. actions, not only would all hope of uniformity be destroyed, but the right to trial by jury would be emasculated. Of what avail is a jury trial in the first instance if the case can be appealed to a court who will try the facts? Under Petitioner's position, an appellate court could weigh the evidence and arrive at a conclusion different from that determined by the triers of fact, although there was evidence to support the verdict. An appellate court could disagree with the verdict, and nullify it as contrary to the manifest weight of the evidence. Indeed, an appellate court could handle these reviews as if the court of review were the jury. (As a classical example, witness the appellate court's conduct in this instance. Here it not only weighed the evidence, but then refused to give Respondent a final order, although the state statute made it mandatory for it to do so. It obviously was attempting to prevent review of its conduct).

As we have already stated, this Court has adhered to the time-honored principle that courts of review were limited to a consideration of errors of law where there is an evidentiary basis for the verdict. This Court has never recognized the right of any appellate tribunal to weigh the evidence.

Since 1891, when it decided *Aetna Life Ins. Co.* v. *Ward*, 140 U. S. 76, 91, this court interpreted the common law principles as prohibiting a review of the weight of the evidence and limiting its review to errors of law. We might further add that in addition to Federal Courts of review, courts throughout the country interpret the common law principles in the same manner.

This Court, realizing that if a jury verdict is to have meaning it must be respected on appeal, has specifically enunciated in no uncertain terms the limitation of the powers of reviewing courts in F. E. L. A. actions. No principle is better established than that once there is an evidentiary basis for a verdict in an F. E. L. A. action, such verdict cannot be disturbed because a court of review would have decided otherwise, or thinks the jury should have decided the case differently.

The first and leading case on this point, as applied to F. E. L. A. cases, is *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, decided in 1943. This Court said, in that case, p. 35:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In another earlier case, *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350 (decided in 1943), the court said, pp. 353, 354:

> "The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasizes the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving controverted evidence * * * To withdraw such a question from the jury is to usurp its functions."

Next we come to *Lavender* v. *Kurn*, 327 U. S. 645, decided in 1946. Here the court said, pp. 652, 653:

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

In *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 653, (1947), the court said:

> "Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable."

In *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), which involved an appeal from the Appellate Court of Illinois, where a judgment had been reversed for an employee in an action under the Jones Act (*Senko* v. *LaCrosse Dredging Corp.*, 7 Ill. App. 2d. 307), this court took occasion to explain that it did not ordinarily take cases to re-examine facts, but the lower courts apparently had not fully understood its holding that fact questions should be left to juries and went on to say, referring to the discretion as to facts with which a jury invested, p. 374:

> "The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."

In *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, (1957) the court again adverted to the fact that (p. 510):

> "* * * Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury."

The cases of *Webb* v. *Illinois Central R. Co.*, 352 U.S. 512, and *Ferguson* v. *Moore McCormack Lines*, 352 U.S. 521, decided contemporaneously with the *Rogers* case, exemplify the same principle.

Moreover, as the Court pointed out in the *Rogers* case, it was the intent of Congress that questions of fact should be decided by the jury.

Footnote No. 18, page 508, to the *Rogers* v. *Mo. Pac. R. Co.*, 352 U. S. 500) opinion reads thus:

> "[18] While the primary reason was a protest against undue comment by trial judges as to the facts, the original 1906 Act provided: "All questions of negligence and contributory negligence shall be for the jury." 34 Stat. 232. Hearings before Senate Committee on Interstate Commerce on H. R. 239, 59th Cong., 1st Sess. 68-69. The inclusion in the 1908 statute of another provision, "All questions of fact relating to negligence shall be for the jury to determine," was proposed but not adopted. The view prevailed that this would be surplusage in light of the Seventh Amendment embodying the common-law tradition that fact questions were for the jury. Hearings before Senate Committee on Education and Labor on S. 5307, 60th Cong., 1st Sess. 8-9, 45-46."

Faced with this long list of cases, all decided by this Court and all upholding the sanctity of the jury's verdict, once its factual basis has become apparent, how can it be

argued that the Illinois Appellate Court has any right to set aside the jury's verdict, for the purpose of retrial or for any other purpose? If there is a basis for the jury's verdict, there is no basis for retrial.

IV.

The amount of the verdict is a matter of fact and is reviewed according to the same principles as any other fact issue.

Petitioner asserts that in its opinion the Illinois Supreme Court did not consider its contention that the amount of the verdict was grossly excessive and urges that the case should be reversed for a consideration of that question.

Petitioner fails to mention that the amount of damages is a question of fact, and is subject to the same principles of review as are other questions of fact. As the Illinois Supreme Court said in *Smith* v. *C. P. & St. L. Ry. Co.*, 236 Ill. 369, 371:

> "It is likewise insisted that the damages are excessive. Appellant refers to no text book or reported case which holds that the assessments of damages is a question of law. On the other hand, by every rule of law it must be considered a question of fact."

Since the amount of the damages is a question of fact, it follows that it must be treated as any other question of fact, and once the evidentiary basis for it appears, the appeliate court's function of review is exhausted. It must be remembered that the trial court which had the power to set the verdict aside or to require a remittitur because of excessiveness, expressly ruled against this contention (Appendices p. 82-A).

Furthermore, the basis for the award of damages was reviewed in detail in the opinion of the Illinois Supreme Court (Appendices, pp. 19-A—26A). It found an evidentiary basis for the award. No further review is proper.

Whether the issue relates to negligence, causation, damages, or the validity of a release, matters of fact are involved and the sole query on review is whether there is evidence to sustain the findings of the jury.

Moreover, it is well established in the Federal System that Federal courts of review do not interfere with the amount of damages awarded in an action of this character when a motion for a new trial has been denied. (*Fairmount Glass Works* v. *Cubs Fork Coal Co.*, 287 U. S. 474, 481.)

Petitioner refers to the *Bombolis* Case (*Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U.S. 211). Petitioner might have more appropriately noted that the United States Supreme Court has held that if a State gives a jury trial, it means a jury trial with the court and jury exercising the functions it has defined as proper for each in this statutory cause of action. (See *Dice* v. *Akron C. & Y. R. Co.*, 342 U.S. 359, 363, wherein the *Bombolis* Case is treated thus.)

Conclusion.

Regardless of what approach may be employed, the sole and only issue in this case is whether a court of review in an Employer's Liability action may re-weigh the evidence upon which the jury reached its verdict and nullify that verdict, although it has ample foundation in the evidence.

On numerous occasions, this Court, in unmistakable terms, has defined the province of a court of review in an action of this character. The granting of certiorari here would serve no purpose whatsoever.

It is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

JAMES A. DOOLEY,
Attorney for Respondent.

APPENDIX A.

Original Dissenting Opinion
(Filed March 11, 1957)

JUSTICES SCHAEFER, HERSHEY, and DAVIS, dissenting:

We concurred in the unusual procedure by which this case was brought to this court, because of doubts we then entertained as to whether a verdict in a Federal Employers Liability Act case could be set aside as against the manifest weight of the evidence, or indeed, on any other ground. We have examined the question further, particularly the recent opinions in *Rogers* v. *Missouri Pacific Railroad Co.* ..... U.S. ....., and the other cases decided by the Supreme Court of the United States on February 25 of this year.

The conclusion that we draw from these cases is not in accord with that of the majority. In each of them the judgment brought before the Supreme Court was a final judgment; none involved a judgment that remanded the cause for a new trial. We conclude that it was not intended to eliminate entirely the historical attribute of common-law jury trial that makes it the duty of a judge to set aside a verdict that is against the manifest weight of the evidence. That power has consistently been recognized as an inherent part of trial by jury. (Cf. *Corcoran* v. *City of Chicago*, 373 Ill. 567.) The power of a receiving court to set aside a jury verdict entered in a Federal Employers Liability Act case has not been abrogated, although it is confined within narrow limits

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In this case the plaintiff based his motion to strike the remanding order on section 75(2)(c) of the Civil Practice Act (Ill. Rev. Stat. 1955, chap. 110, par. 75(2)(c)). If the Appellate Court judgment had been based solely upon a finding that the verdict was against the manifest weight of the evidence, the statute would be applicable. But in addition the Appellate Court found that new trial should be ordered because of numerous errors which, in its opinion, deprived the defendant of a fair trial. In such a case, it is clear that the Appellate Court is not obliged to strike its remanding order, and this court has so held. (*Lees* v. *Chicago and North Western Railway Co.* 409 Ill. 536.) We there held that the statute did not apply to a case where the question involved was the competency of evidence offered by the defendant to establish a defense, but excluded in the trial court.

In this case the Appellate Court ruled specifically that the trial court erred (1) in allowing plaintiff's lay witnesses to express an opinion as to Bowman's competency without a proper foundation being laid, (2) in permitting plaintiff's witnesses to testify to conclusions instead of facts from which the jury could properly evaluate the testimony and draw inferences from facts, (3) in admitting hearsay testimony, (4) in refusing to receive in evidence 11 checks issued by Bowman on the bank account established with proceeds of his settlement and used by him in various important business transactions, (5) in rejecting the testimony of Bowman's lawyer regarding conversations with Bowman during settlement negotiations, (6) in permitting physicians to testify to subjective symptoms, (7) in permitting the plaintiff to attempt the impeachment of a defense witness on objectionable matters elicited on cross-examination, (8) in requiring de-

fendant's claim agent to testify regarding the customary fee in contingent cases, and (9) in considering before the jury whether the defendant's officers had complied with a certain *subpoena duces tecum*. Because of the foregoing, the Appellate Court did not deem it necessary to discuss alleged errors relating to the conduct of plaintiff's counsel, the refusal of tendered instuctions, and the amount of the verdict.

If the question of the Appellate Court's appraisal of the weight of the evidence in this case was open to review, Justices Schaefer and Davis would agree that the Appellate Court erred in its appraisal. Justice Hershey is in agreement with the Appellate Court on this question. However, section 92(3)(b) of the Civil Practice Act, (Ill. Rev. Stat. 1955, Chap. 110, par. 92(3)(b),) precludes this court from making that determination.

We are convinced this court did not have authority to require the Appellate Court to strike its remanding order. Therefore, it is our opinion that leave to appeal was improvidently granted and we are without jurisdiction in the case.